

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE MIRANDA M. DU, DISTRICT JUDGE
AND THE HONORABLE WILLIAM G. COBB, MAGISTRATE JUDGE
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UNITED STATES OF AMERICA, :
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:
Plaintiff/Appellant, : No. 3:73-cv-0127-MMD-WGC
:
-vs- :
:
WALKER RIVER PAIUTE TRIBE, : October 15, 2018
:
-vs- :
:
Walker River Irrigation : United States District Court
District, Et Al, : 400 S. Virginia Street
:
:
Defendant(s)-Appellees. :
:

TRANSCRIPT OF STATUS CONFERENCE

A P P E A R A N C E S:

FOR THE UNITED STATES: Andrew Guss Guarino
David L. Negri

WALKER RIVER IRRIGATION DISTR: Gordon H. DePaoli
Dale Ferguson

LYON COUNTY, MONO COUNTY, ET Al: Rodrick Walston

WALKER LAKE WORKING GROUP Iris Thornton
MINERAL COUNTY: Sean A. Rowe
Simeon Herskovits

WALKER RIVER PAIUTE TRIBE: Wes Williams

T I T L E P A G E (cont'):

FISH & WILDLIFE FOUNDATION:	Chris Mixson
STATE OF CALIFORNIA:	Nhu Q. Nguyen
PERI FAMILY TRUST:	Brad Johnston
NEVADA DIVISION OF WILDLIFE:	Bryan Stockton
BROBRICK TRUST:	Therese Ure
WATERMASTER:	Karen Peterson

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Reported by:	KATHRYN M. FRENCH, RPR, CCR NEVADA LICENSE NO. 392 CALIFORNIA LICENSE NO. 8536
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09:44:49 1 Reno, Nevada, Monday, October 15, 2018, 10:00 a.m.

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09:45:06 3

10:15:30 4 JUDGE DU: Good morning.

10:15:31 5 Please be seated.

10:15:33 6 THE CLERK: 3:73-civil-127-MMD-WGC, USA versus

10:15:41 7 Walker River Irrigation District. This is a Status

10:15:45 8 Conference.

10:15:45 9 Present in the courtroom we have David Negri for the

10:15:48 10 United States. On the phone we have Guss Guarino for the

10:15:52 11 United States.

10:15:52 12 In the courtroom, present for Walker River

10:15:58 13 Irrigation District, we have Gordon DePaoli and Dale Ferguson.

10:16:02 14 In the courtroom, present for the Bobrick Trust and

10:16:05 15 related entities, we have Therese Ure.

10:16:08 16 Present for the State of California and its

10:16:12 17 entities, we have Ms. Nguyen.

10:16:15 18 In the courtroom, present -- on the phone, for the

10:16:21 19 defendants Centennial Livestock, Lyon County, and Mono County,

10:16:26 20 we have Rodrick Walston.

10:16:27 21 For the National Fish & Wildlife Foundation and

10:16:32 22 related entities, we have Chris Mixson in the courtroom.

10:16:36 23 In the courtroom for the Watermaster, we have

10:16:40 24 Karen Peterson. The Watermaster, Joanne Sarkesian is present.

10:16:48 25 Present in the courtroom for the Walker River Paiute

10:16:51 1 Tribe, we have Wes Williams.

10:16:53 2 Present in the courtroom for the Nevada Division of
10:16:55 3 Wildlife, we have Brian Stockton.

10:16:59 4 Also present for Fox Ditch Company, and on behalf of
10:17:02 5 Frade Ranch, we have Mr. DePaoli.

10:17:06 6 Present for Mineral County and the Walker Lake
10:17:11 7 Working Group, we have Iris Thornton.

10:17:13 8 On the telephone, we have Simeon Herskovits.

10:17:15 9 In the courtroom we have Mineral County's D.A., Sean
10:17:19 10 Rowe in the courtroom.

10:17:20 11 Present in the courtroom for the Peri Family Related
10:17:24 12 Trust we have Brad Johnston.

10:17:27 13 JUDGE DU: Good morning, everyone.

10:17:31 14 I am, as you know, new to the case, and I appreciate
10:17:37 15 reading the proposed agenda items. I think we should proceed
10:17:42 16 with the items on the agenda. And Judge Cobb probably may
10:17:47 17 have more questions than I do. And then I have some questions
10:17:50 18 for the parties after we complete -- I may still have
10:17:53 19 questions after we complete the agenda items. So, perhaps
10:17:57 20 we should begin with the agenda items first.

10:17:57 21 And do you normally go with the United States?

10:18:03 22 MAGISTRATE JUDGE COBB: We, normally, just
10:18:04 23 follow the agenda items, and whoever wishes to speak on the
10:18:12 24 subject as the person most knowledgeable.

10:18:12 25 JUDGE DU: Judge Cobb just reminded me, before

10:18:17 1 we begin, that I was surprised by the reference to the various
10:18:21 2 cases, by C-125-A, C-125-B, and C-125-C. I refer to them
10:18:30 3 differently and I hope, going forward, counsel will do the
10:18:33 4 same.

10:18:33 5 This case, if you look at the docket, it's
10:18:37 6 3:73-cv-127. And I gather that 127 -- now I can't remember.
10:18:45 7 Let's see, is it 125-B?

10:18:47 8 MAGISTRATE JUDGE COBB: Yes.

10:18:49 9 JUDGE DU: Yes. 125-B.

10:18:51 10 MAGISTRATE JUDGE COBB: Is 127.

10:18:52 11 JUDGE DU: You see the confusion.

10:18:53 12 I would appreciate, going forward, if we would just
10:18:56 13 refer to the case number by the actual case number that's been
10:18:59 14 designated on CM/ECF.

10:19:02 15 MAGISTRATE JUDGE COBB: Judge, if I may
10:19:04 16 respectfully suggest, in that regard, maybe the case
10:19:07 17 nomenclature ought to just eliminate part of the caption
10:19:12 18 that says sub-proceedings C-125-B, and just refer to it
10:19:16 19 with the overall case, which is the 125 case, and the
10:19:20 20 sub-proceedings being C-73-127.

10:19:33 21 JUDGE DU: If we may move onto the agenda with
10:19:37 22 the introduction of the parties and counsel, which I don't
10:19:39 23 think we need to do so again, given that Miss Clerk has called
10:19:43 24 the counsel and parties, unless you think there's a reason for
10:19:47 25 the additional introduction.

10:19:49 1 MR. NEGRI: Your Honor, if I could briefly.

10:19:50 2 THE CLERK: Please state your name so that we
10:19:52 3 keep the record straight.

10:19:53 4 MR. NEGRI: David Negri for the United States.

10:19:55 5 I just wanted, Your Honor, to explain we have two
10:20:03 6 federal counsel in this case. And Judge Cobb is familiar with
10:20:05 7 this. I just wanted to explain who is who.

10:20:08 8 My name is David Negri. I'm with the Justice
10:20:12 9 Department's Energy and Natural Resources Division and I'm
10:20:15 10 actually officed in Boise, Idaho. My role in this case is to
10:20:19 11 represent the federal agencies. We have four federal agencies
10:20:23 12 involved -- actually five. I represent four of them. I
10:20:26 13 represent the army, the marines, the Forest Service, and the
10:20:30 14 Bureau of Land Management.

10:20:32 15 Also on the phone with us today is Guss Guarino,
10:20:37 16 out of the Justice Department's involvement in Natural
10:20:41 17 Resources Division in Denver, Colorado. Mr. Guarino is part
10:20:45 18 of our Indian Resources Section. I am part of our Natural
10:20:49 19 Resources Section. Mr. Guarino represents the Walker River
10:20:54 20 Paiute Tribe and several other Indian interests in this case.
10:20:58 21 Generally, Mr. Guarino has been taking the lead because, as
10:21:03 22 the Case Management Order lays out, the claims of the Walker
10:21:08 23 River Paiute Tribe have been going forward first.

10:21:11 24 Mr. Guarino intended to be here. He spent much
10:21:15 25 of yesterday in the airport in Denver and wasn't able to make

10:21:19 1 it. However, he will, with the Court's permission, he would
 10:21:22 2 probably, more or less, take the lead today. I am here in the
 10:21:26 3 court, though, and he is on the phone.

10:21:29 4 And I just wanted to clarify that at the start.

10:21:33 5 JUDGE DU: Thank you. I appreciate the
 10:21:35 6 clarification --

10:21:35 7 MR. NEGRI: Thank you.

10:21:36 8 JUDGE DU: -- at least for my benefit. Judge
 10:21:39 9 Cobb may already be familiar with counsel.

10:21:41 10 If there are no further introductions, I would like
 10:21:45 11 us to proceed with item number two, which is the relationship
 10:21:48 12 between the various cases. On this subject, I may have a
 10:21:51 13 couple questions.

10:21:53 14 MR. GUARINO: Your Honor, this is Guss Guarino
 10:21:55 15 with the Department of Justice. If I may?

10:21:58 16 JUDGE DU: Yes. Please proceed.

10:22:05 17 MR. GUARINO: Thank you.

10:22:06 18 And as Mr. Negri described, my apologies for not
 10:22:09 19 being there. Despite quite a bit of effort yesterday, United
 10:22:16 20 seems to be okay with cancelling a flight at about eight
 10:22:20 21 o'clock last night. I'm sorry I can't be there in person to
 10:22:23 22 meet you.

10:22:23 23 Over the last several weeks, which has been typical,
 10:22:27 24 I've been taking the lead on trying to coordinate the parties'
 10:22:32 25 efforts associated with pulling the Status Report together

10:22:36 1 that was filed in early August, as well as pulling this agenda
10:22:40 2 together to sort of give you -- the parties' thoughts on what
10:22:45 3 might be helpful to discuss today. I would like to begin by
10:22:49 4 just pointing out that I think we were being over-inclusive on
10:22:53 5 the items to discuss with Your Honor today. We understand
10:22:58 6 that you are the newest to the case, I think. Those parties
10:23:05 7 in the room, counsel in the room, we've had varying degrees
10:23:07 8 of years associated with the case, so our knowledge of the
10:23:11 9 history is quite deep, and we don't know how much you want to
10:23:16 10 try to get up to speed in a conversation with us in the room
10:23:19 11 today. But, we thought we would put more items on the, on the
10:23:23 12 agenda than not.

10:23:27 13 Item number two associated with the relationship
10:23:30 14 between 125-C and the other sub-proceedings, the Court is
10:23:35 15 correct that each one of the sub-proceedings was assigned a
10:23:37 16 specific and different case number. But what, what is very
10:23:44 17 clear, is that this is all just one case, Your Honor, under
10:23:47 18 the case that was initiated almost, some, 100 years ago, when
10:23:52 19 the United States filed its initial Complaint in 1924. What
10:23:57 20 has resulted from then is a perpetual and ongoing case that we
10:24:01 21 continue to deal with as different issues arise.

10:24:05 22 With respect to what we, I think previously
10:24:10 23 described as the B case, but we can certainly refer to it
10:24:14 24 as the 127 case, the case associated with the water rights
10:24:21 25 claims of the United States that were filed in the 1990s, to

10:24:25 1 supplement or alter those that had been previously decreed in
10:24:30 2 the 1930s, the 125-B case involved the water rights claims of
10:24:38 3 the United States called "counterclaims." And there's a
10:24:41 4 reason why they are called counterclaims. The reason that
10:24:44 5 they are called counterclaims actually has to do with the case
10:24:48 6 that we used to refer to as the A case, which is no longer
10:24:51 7 active, and which was resolved many years ago. But, anyway,
10:24:57 8 it's all rather inner-connected. And our putting the
10:25:01 9 relationship between 125 and the other sub-proceedings as
10:25:05 10 an agenda item on the Court is -- as an agenda item for the
10:25:11 11 Court to discuss, is, to the extend the Court needs any sort
10:25:14 12 of discussion about how did this all work out, or what's the
10:25:17 13 relationship between the cases, we are here to help the Court
10:25:22 14 with an understanding of that.

10:25:26 15 Two of the sub-proceeding cases are still active;
10:25:28 16 and that is this case, the 127 case, and the other case
10:25:32 17 formerly referred to as the C case, but is 73-cv-00128, and
10:25:43 18 that has to do with claims associated with the Public Trust
10:25:48 19 Doctrine asserted by Mineral County.

10:25:50 20 I'm going to stop there to see if the Court has
10:25:53 21 any questions of me, or any explanation about any one of the
10:25:56 22 sub-proceedings, or what we call the main case, as it is
10:26:02 23 encompassed under the umbrella of the 1936 decree.

10:26:06 24 JUDGE DU: And I appreciate the parties'
10:26:08 25 taking the time to add items on the agenda that you believe

10:26:13 1 may be helpful to me as the newest person to these cases,
10:26:17 2 but I have reviewed the dockets for all the cases; 125, 126,
10:26:23 3 127, 128; so, I do have a general understanding as to their
10:26:27 4 relationship. So I don't need you to spend time to educate
10:26:32 5 me on the case, but I appreciate the effort.

10:26:35 6 I do have a question -- and this was something that
10:26:37 7 Judge Cobb had raised, so I'm going to steal his question.
10:26:42 8 And that is, the relationship between this case and the 128
10:26:47 9 case because that -- the 128 case is stayed, given that the
10:26:51 10 Ninth Circuit certified the question of the Nevada Supreme
10:26:57 11 Court's recognition of the Public Trust Doctrine. That case
10:27:00 12 is stayed. And the question that Judge Cobb had posed to me
10:27:03 13 is whether this case should be stayed as well, pending the
10:27:06 14 Nevada Supreme Court's resolution of the certified question
10:27:10 15 to the Ninth Circuit?

10:27:12 16 I have some thoughts, but I thought I'd let the
10:27:15 17 parties address that issue first given -- initially, I was
10:27:18 18 reluctant to add that as an item on the agenda in the Minute
10:27:22 19 Order because I thought of the cases as being unrelated. But
10:27:25 20 given that everyone acknowledged that you are all familiar
10:27:30 21 with the various cases, that perhaps this may be a good chance
10:27:33 22 for you to tell me whether or not this case should continue to
10:27:37 23 proceed or not. But like I said, I have my own views, but I
10:27:42 24 want to hear the parties' views as well.

10:27:44 25 MR. GUARINO: Your Honor, this is Guss Guarino

10:27:46 1 with the United States. I don't have much to comment on with
10:27:49 2 respect to that observation. I had not considered whether
10:27:53 3 or not it was appropriate to stay the 127 case in light of
10:27:57 4 the fact that the 128 case is continued to be pending before
10:28:02 5 the Nevada Supreme Court. Typically, I would want to have a
10:28:09 6 chance to converse with lead counsel for the, essentially, the
10:28:14 7 plaintiffs for the 128 case, which is Mr. Herskovits. And, I
10:28:19 8 would also consult, of course, with the Walker River Paiute
10:28:26 9 Tribe as well, Mr. Negri. But at this point, I would like
10:28:28 10 to just turn it over to Mr. Herskovits, maybe, to add his
10:28:32 11 thoughts and comments about the 128 case, as he is lead for
10:28:36 12 the plaintiffs' interest there.

10:28:39 13 MR. HERSKOVITS: Good morning, Judge Du and
10:28:46 14 Magistrate Judge Cobb. I'm Simeon Herskovits, lead counsel
10:28:50 15 for Mineral County and the Walker Lake Working Group.

10:28:53 16 Your Honor, you are correct that the 128 case
10:28:58 17 remains stayed, or is not active before this Court at this
10:29:02 18 time while it remains, technically, in the Ninth Circuit,
10:29:05 19 with two certified questions to the Nevada Supreme Court.

10:29:09 20 We have not conferred with Mr. Guarino or Mr. Negri
10:29:13 21 or Mr. Williams, counsel for the Tribe, about whether or not
10:29:16 22 there's any reason for the 127 case to be stayed pending
10:29:21 23 resolution of the issues in 128. I don't believe that
10:29:25 24 there is a need to stay further proceedings in 127 while
10:29:29 25 the issues in 128 are resolved. There is currently a briefing

10:29:33 1 schedule that will be completed before the Nevada Supreme
10:29:37 2 Court by early spring, and I would think that there is a
10:29:41 3 reasonable prospect that there will be a decision of the
10:29:44 4 certified question sometime next year. I'm not sure that
10:29:47 5 there will be further proceedings of any great substance in
10:29:50 6 the Ninth Circuit, so it may be that within a year or so, the
10:29:54 7 case -- 128 I mean -- is active again before this case --
10:30:00 8 before this Court, pardon me, and can proceed alongside of
10:30:03 9 the 127 case. The two have not been locked together,
10:30:06 10 procedurally, in an exact fashion, but there are parallels
10:30:11 11 regarding service. And some of the issues in 127, the
10:30:14 12 resolution may be affected by the resolution of the public
10:30:18 13 trust claim in 128. That's probably discretionary to the
10:30:23 14 Court whether or not it decides to stay 127 pending 128 coming
10:30:29 15 back and being active again before the district court, but I
10:30:33 16 don't believe, in our view, that one is -- that 127's further
10:30:39 17 proceedings need to be stayed until 128 comes back to the
10:30:45 18 Court.

10:30:45 19 JUDGE DU: Well, depending on how the Nevada
10:30:48 20 Supreme Court addresses the Public Trust Doctrine issue, it
10:30:55 21 may affect existing rights, but I don't think that it would
10:30:59 22 foreclose the claims that the United States is asserting on
10:31:02 23 behalf of the Tribe because the Public Trust Doctrine, it
10:31:06 24 would seem to me, would date back to when Nevada became a
10:31:10 25 State, is that right? So the rights would, in terms of

10:31:15 1 priority, would be up to that date. But depending on when
10:31:19 2 the tribes were formed, the rights may be prior to the rights
10:31:27 3 that Mineral County is asserting under the Public Trust
10:31:32 4 Doctrine.

10:31:32 5 Am I right?

10:31:33 6 And so therefore -- I'm concerned about a stay. I'm
10:31:36 7 inclined not to stay the case, so I can tell you that, unless
10:31:39 8 the parties think that there's a reason for a stay. But
10:31:43 9 certainly, I think, depending on how the issue is resolved,
10:31:48 10 there will be rights that need to be sorted out in this case
10:31:52 11 because of the 128 case.

10:31:55 12 MR. HERSKOVITS: I think, Your Honor, that,
10:31:58 13 certainly, in a sense, the bottom line reality, as you stated,
10:32:01 14 it is correct in that the claims that the United States
10:32:05 15 and the Walker River Paiute Tribe have asserted are not
10:32:08 16 necessarily, uh, dependent on, or unresolvable by the Court
10:32:16 17 without the public trust claim having been previously
10:32:20 18 determined or decided by the Nevada Supreme Court and the
10:32:23 19 Ninth Circuit. However, I just want to make clear to the
10:32:27 20 Court that, one, I don't purport to speak for any other
10:32:29 21 parties than Mineral County and Walker River Lake Working
10:32:33 22 Group. And two, we do not, we do not view -- and I think that
10:32:38 23 there's an open question -- that the Public Trust Doctrine is
10:32:41 24 not a prior appropriation right in and of itself. It is not
10:32:45 25 some sort of a water right with a priority date per se. It is

10:32:49 1 an underlying background principle and we should not get into
10:32:53 2 the substance of that case until it comes back to this court,
10:32:56 3 but --

10:32:56 4 JUDGE DU: No, no. And I appreciate that. I
10:32:58 5 was going to tell you I don't want you to have to make any
10:33:00 6 concessions you're not prepared to make because this was not
10:33:02 7 an issue that we had notice in the Minute Order.

10:33:06 8 MR. HERSKOVITS: Right. Thank you, Your Honor.

10:33:07 9 I would just say that I think that your basic view
10:33:10 10 that you've expressed, which is that the rights being claimed
10:33:13 11 by the United States and the Walker River Paiute Tribe are
10:33:17 12 claims that the Court could rule on and resolve separate from
10:33:21 13 a consideration and final disposition of the public trust
10:33:25 14 claim. And I would also add that while it's not for me to
10:33:28 15 say, perhaps, with any certainty, it seems unlikely that the
10:33:32 16 ultimate merits of the claims in the 128 -- oh, sorry, the 127
10:33:37 17 case, would actually be resolved finally before the 128 claim
10:33:43 18 comes back to the court. So, there may be more than enough
10:33:46 19 time to make sure that the Court is aware of how the Public
10:33:52 20 Trust Doctrine has been construed by the Nevada Supreme Court
10:33:54 21 and the Ninth Circuit before it makes a final ruling on the
10:33:58 22 claims in 127.

10:34:00 23 JUDGE DU: And while I would want for this
10:34:03 24 case to be resolved in a year, I agree with you, I don't
10:34:06 25 think it would be, given how long it's taken for service to

10:34:09 1 be effectuated.

10:34:10 2 But anyone else that would like to be heard on this
10:34:13 3 issue?

10:34:15 4 MR. DEPAOLI: Gordon DePaoli, Your Honor, on
10:34:22 5 behalf of the Walker River Irrigation District. My answer
10:34:26 6 is, no, it does not need to be stayed. This case, the 127
10:34:31 7 case, involves determination of rights, which have not been
10:34:35 8 determined both under federal law and Nevada law and
10:34:38 9 California law, as well as the 128 case, involves how, and
10:34:44 10 to what extent the Public Trust Doctrine may impact existing
10:34:49 11 and established water rights. So, there is no reason to stay
10:34:53 12 this case while that one gets decided by the Nevada Supreme
10:34:59 13 Court. There will be time enough, after that happens, to deal
10:35:02 14 with it in terms of any new rights which are established in
10:35:06 15 the B case.

10:35:07 16 JUDGE DU: Mr. DePaoli, would you agree that,
10:35:11 17 at some point -- there certainly is some friction and conflict
10:35:14 18 because there's only so many water rights available to be
10:35:17 19 allocated?

10:35:20 20 MR. DEPAOLI: I --

10:35:21 21 JUDGE DU: Am I right?

10:35:23 22 So if the Nevada Supreme Court recognizes the Public
10:35:28 23 Trust Doctrine, that could affect existing rights.

10:35:30 24 MR. DEPAOLI: That is one of the principal
10:35:32 25 questions to the Nevada Supreme Court, yes.

10:35:34 1 JUDGE DU: All right. Thank you.

10:35:39 2 Anyone else?

10:35:39 3 (No response.)

10:35:42 4 JUDGE DU: Based on what I'm hearing and
10:35:44 5 based on what I was thinking about the case, I agree that I
10:35:47 6 don't think this case should be stayed. And given how long
10:35:49 7 the case has been proceeding, I would be reluctant to stay
10:35:53 8 the case anyway, knowing that there will be a resolution to
10:35:56 9 the certified question within the next year.

10:35:58 10 So, perhaps we can -- I don't know if there's
10:36:00 11 anything else the parties need to address in terms of item
10:36:03 12 number two? If not, perhaps we can move to item number three.

10:36:14 13 MR. GUARINO: Thank you, Your Honor. Guss
10:36:16 14 Guarino for the United States. I'll proceed into number
10:36:19 15 three, if that's okay.

10:36:20 16 JUDGE DU: Yes.

10:36:22 17 MR. GUARINO: Great. So with respect to item
10:36:25 18 number three, and in reflection upon, upon what the parties
10:36:31 19 and Magistrate Judge Cobb were very heavily involved in up
10:36:37 20 to the time of approximately May 2015, when the district
10:36:43 21 court issued its order affecting the United States' rights, I
10:36:47 22 thought it was -- I thought it would be important to bring the
10:36:51 23 Court up to speed on, sort of, where we were when we left off.
10:36:54 24 And where we were when we left off was, obviously, the United
10:36:59 25 States had been engaged in a very long and challenging process

10:37:04 1 to effectuate service on those parties that the Court had
10:37:12 2 previously ordered the United States to effectuate service
10:37:16 3 on. And if the Court has reviewed the, the proceedings and
10:37:21 4 pleadings in the case, particularly the ones that we've
10:37:24 5 pointed out, the Case Management Order of 2000 -- I think it's
10:37:31 6 CM/ECF document number 108 -- had directed the United States
10:37:37 7 to effectuate service or secure waiver of service on a very
10:37:43 8 broad swath of potential water rights holders, to inform
10:37:46 9 those water rights holders of the claims that the United
10:37:50 10 States is asserting. And the United States spent the better
10:37:53 11 part of two decades -- a decade and and-a-half, and a great
10:37:58 12 deal of effort to do just that.

10:38:00 13 Just around May 2015, we, literally, had gotten to
10:38:06 14 the point of being done with that process. We had filed a
10:38:09 15 series of reports with the Court about the updates. There
10:38:13 16 were 20 of them, I think, in all, updating the Court about
10:38:17 17 what our results were from service activities. And then just
10:38:23 18 before, just in the winter of 2018, I believe, we had filed a
10:38:27 19 motion to conclude the service process by having the Court
10:38:32 20 issue an order authorizing the United States to publish notice
10:38:39 21 following, following the rules, to give anyone known and
10:38:45 22 unknown, any final notice concerning the water rights claims
10:38:48 23 of the United States. We secured that order from the Court
10:38:52 24 and we completed that, that publication process, and we filed
10:38:58 25 the affidavits. As I reviewed the docket, we filed the

10:39:03 1 publication notices with the Court just prior to May of 2015.
10:39:09 2 So, it is our belief that to the extent the Court had
10:39:13 3 previously ordered the United States to inform all those of
10:39:17 4 the basin of the existence of this case, that we had in fact
10:39:20 5 done so by the time this Court's May 2015 order came out
10:39:27 6 dismissing, at that point, all of the claims of the United
10:39:31 7 States. And with that conclusion, a very major chapter of
10:39:34 8 this case that was -- that was the ongoing and continued focus
10:39:39 9 of the United States, the Court, and all parties active in the
10:39:44 10 case, that is, we believe, now done.

10:39:48 11 Another item that the parties were engaged in was --
10:39:55 12 resulted in what we call the superseding order regarding
10:39:59 13 filing and service. And Magistrate Judge Cobb knows a great
10:40:03 14 deal about this. He was instrumental in helping us craft
10:40:06 15 this order and come together to effectuate the Court's concept
10:40:11 16 about keeping folks informed about these proceedings and
10:40:16 17 managing this large number of individuals that are -- that
10:40:20 18 have been served in this case and brought into this case
10:40:23 19 and have, uh, some of which have secured counsel for this
10:40:27 20 case, some of which have simply filed a Notice of Intent to
10:40:31 21 participate, or an interest in staying involved in this case
10:40:36 22 a little more directly.

10:40:37 23 We crafted the superseding order, superseding
10:40:41 24 service order in late -- in mid 2015, as I recall, and it was
10:40:47 25 issued. The point of that order was to keep folks apprised,

10:40:52 1 and also address the challenges that we have with service.
10:40:56 2 Of course, if there is -- I don't know the number off the top
10:40:59 3 of my head, but I know we served approximately 4,000 people,
10:41:03 4 and approximately over a 1,000 of them have filed responses
10:41:09 5 indicating that they want to stay in touch with this case, or
10:41:13 6 they wanted to participate in this case otherwise. For folks
10:41:18 7 who have retained a lawyer, it is not a problem to notify and
10:41:22 8 served those parties because, of course, we all use the CM/ECF
10:41:28 9 system and are notified almost instantaneously by e-mail, but
10:41:33 10 many people are not tied into that system. And particularly
10:41:37 11 if you don't have a lawyer, you don't, you don't get service
10:41:40 12 that way.

10:41:41 13 And so the courts -- the court created a website,
10:41:45 14 a very unique website, in which the pleadings of this case
10:41:49 15 are posted and updated by the court. We have developed a
10:41:54 16 system by which the parties are not required to mail out a
10:42:01 17 copy of every pleading or every document that they, that they
10:42:08 18 should file with the court. And there's a special proceeding
10:42:10 19 that we developed, or a special process by which we created a
10:42:15 20 postcard notice list. And we've required people, even if you
10:42:19 21 don't have a lawyer, if you want to see what a pleading is,
10:42:24 22 we are directing them to go to the website. But, we have --
10:42:29 23 we've developed a system in which we will at least mail out
10:42:33 24 a postcard to the folks who have not given us an e-mail, but
10:42:39 25 still indicated they want to be participating in this case,

10:42:42 1 and when there is a substantive pleading that comes in, or
10:42:47 2 a series of substantive pleadings that come in, then the
10:42:50 3 parties are required to send out a postcard, which is much --
10:42:56 4 a lot less expensive, and a lot less difficult to manage
10:43:01 5 logistically. But, it does give notice to folks who have
10:43:04 6 indicated that they don't have e-mail, they don't want to
10:43:07 7 give us their e-mail, or they're not on this CM/ECF system,
10:43:11 8 et cetera, it at least notifies them, by postcard, that if
10:43:14 9 they want to see a pleading, or if you want to see pleadings
10:43:18 10 that have not been filed, or you want to participate, you can
10:43:21 11 go see these pleadings by going to the website. And we've
10:43:24 12 indicated, through the superseding, new service order, where
10:43:27 13 areas in their community are that they can go, uh, access
10:43:32 14 the internet for free -- libraries, typically -- throughout
10:43:38 15 any one of the counties. So -- and that was, all was a
10:43:40 16 remarkable amount of effort and coordination by all the
10:43:43 17 parties, and of course led by, ostensibly, Magistrate Judge
10:43:50 18 Cobb, who helped us, sort of, pull that all together and made
10:43:52 19 sure that everything got done on that.

10:43:54 20 So those are two major activities that took up a
10:43:58 21 remarkable amount of time before May of 2015, in which the
10:44:03 22 United States and all the parties were very active. But
10:44:06 23 again, that was a process and an effort that we managed to
10:44:12 24 complete before May of 2015. So it's, it's important to know
10:44:18 25 that unlike any other case, probably, that you're dealing

10:44:21 1 with, we have a, sort of, unique service process that
10:44:29 2 underlies these proceedings under 125 -- I'm sorry. I'm
10:44:34 3 sorry -- case number 127. And we crafted it from the unique
10:44:39 4 circumstances of this case being a broad water rights claim
10:44:47 5 assertion by the United States in a basin-wide concern?

10:44:54 6 JUDGE DU: And thank you, counsel, for that
10:44:56 7 explanation of the superseding order. I learned about the
10:44:59 8 unique service process in this case in a more difficult way,
10:45:04 9 in that the last two Minute Orders issued granting, I think it
10:45:12 10 was two parties' request to be served electronically instead
10:45:15 11 of getting regular mail, those two orders had to be sent to
10:45:21 12 everyone because the Minute Order didn't specify the manner
10:45:24 13 of service. And I was -- that, of course, resulted in a
10:45:29 14 significant burden on the clerk's office, and that's how I
10:45:32 15 learned about this service of process the hard way.

10:45:35 16 MR. GUARINO: Yes.

10:45:36 17 JUDGE DU: So going forward, where Minute Orders
10:45:39 18 are issued relating to a particular party; for example, issues
10:45:41 19 like granting a request to be served electronically, or to
10:45:45 20 receive service by e-mail, the order would just be sent to
10:45:53 21 the party whose request was granted.

10:45:55 22 MR. GUARINO: Yes.

10:45:56 23 JUDGE DU: It will still be posted on the
10:45:58 24 docket, but it wouldn't be sent to everyone involved.

10:46:01 25 MR. GUARINO: Yes.

10:46:01 1 JUDGE DU: I did not realize -- and Judge Cobb
10:46:04 2 may have to help me here -- that we could post orders on
10:46:10 3 the Court's website instead of having it be sent out. So for
10:46:15 4 example, I was thinking this hearing would have to be served
10:46:18 5 in the normal course. I would prefer not to have to send
10:46:22 6 out a copy of the Minute Order to everyone involved. Are we
10:46:26 7 -- does the superseding order allow us to post the Minutes of
10:46:29 8 this hearing on the website? If not, maybe we should modify
10:46:33 9 the superseding order.

10:46:35 10 MR. GUARINO: Well, Your Honor, Guss Guarino for
10:46:37 11 the United States. If the Court takes -- there's a number of
10:46:39 12 provisions at the back of the superseding order, docket number
10:46:44 13 2100, if the Court takes a look at those, it indicates that --
10:46:50 14 so there are, there are pleadings and proceedings that, that
10:46:55 15 are -- that don't affect -- nobody is going to argue that
10:46:59 16 they affect the rights of another. I would argue that what
10:47:02 17 you just experienced was precisely one of those items, where
10:47:05 18 someone requested to get off the postcard list, get on the
10:47:09 19 e-mail list. That's a matter that does not affect the
10:47:12 20 interest of anybody else and can be handled without serving
10:47:16 21 the entire group. I believe that's already covered. I know
10:47:20 22 it is for the parties, that we can certify in our pleadings
10:47:25 23 that this is a matter that does not concern the interest of
10:47:29 24 another party and are not required to -- and are not required
10:47:33 25 to be served upon every party, nor trigger the postcard notice

10:47:40 1 provision. And I would -- I'm looking at it right now, and
10:47:45 2 can do so during the course of this hearing, to ensure that
10:47:49 3 the Court can take advantage of the same procedural pathway as
10:47:55 4 the parties can.

10:47:58 5 JUDGE DU: Are you referring to paragraph number
10:48:00 6 20 on ECF 2100, at page 10?

10:48:08 7 MR. GUARINO: Sorry, Your Honor. I could not
10:48:10 8 hear.

10:48:10 9 JUDGE DU: I'm sorry. Are you referring to
10:48:13 10 paragraph 20 on ECF 2100, at page 10, filings for which
10:48:17 11 postcard service is not required?

10:48:20 12 MR. GUARINO: Yes.

10:48:21 13 JUDGE DU: So that addresses the parties'
10:48:24 14 filings. It doesn't really address the Court's orders.
10:48:27 15 Perhaps we need to modify the superseding order.

10:48:31 16 MR. GUARINO: If the Court could give us an
10:48:33 17 opportunity to address this issue, I'm sure we can take a
10:48:38 18 close look at the order and, if such a hole exists in the
10:48:45 19 order, we can certainly come back to the Court with a
10:48:49 20 recommendation. That's -- I believe Magistrate Judge Cobb
10:48:53 21 can correct me, but that's what I recall from 2015, and
10:48:57 22 before, and how we were sort of addressing creating this
10:49:00 23 superseding order; that we would attempt to identify those
10:49:04 24 issues where something needed to be covered and addressed them
10:49:10 25 as a working group.

10:49:15 1 JUDGE DU: Judge Cobb, would you like to address
10:49:17 2 this?

10:49:17 3 MAGISTRATE JUDGE COBB: This is Magistrate Judge
10:49:19 4 Cobb. Just two comments here. First is that what Mr. Guarino
10:49:25 5 discussed first was service under Rule 4, and that's been
10:49:29 6 completed. And I think everyone would agree with that, at
10:49:32 7 least in so far as the United States' claims are concerned,
10:49:36 8 both the tribal and federal.

10:49:41 9 Would anyone dispute that?

10:49:41 10 (No response.)

10:49:44 11 MAGISTRATE JUDGE COBB: With no comment then,
10:49:46 12 the second part that Mr. Guarino was talking about pertains
10:49:49 13 to Rule 5 service. And I think as Judge Du pointed out,
10:49:56 14 paragraph 20 indicates that where the issue pertains to only
10:50:04 15 one party in particular, we call it in footnote 1 and ex-parte
10:50:11 16 type of document, then it doesn't have to be served on
10:50:13 17 everybody. Maybe, logistically, the question that I have
10:50:17 18 that now comes to mind, is how do all the other parties know
10:50:21 19 that individual John Doe has now opted for participation by
10:50:29 20 E-service as opposed to the postcard mailing and, say, if
10:50:34 21 Walker River were going to file something, does Mr. DePaoli
10:50:39 22 know to serve it by e-mail on that individual, or serve it
10:50:44 23 by postcard?

10:50:45 24 I think Ms. Griffin, before, kept a list of who
10:50:51 25 falls into what list. But I just -- maybe logistically, there

10:50:57 1 might be an issue that we should address down the road about
10:50:59 2 how do we update these lists about who is opting for service
10:51:03 3 and in what fashion.

10:51:04 4 MR. GUARINO: Your Honor, Guss Guarino for the
10:51:07 5 United States.

10:51:07 6 Magistrate Cobb, I believe the superseding order
10:51:11 7 does indicate that the court, Ms. Griffin, will be the -- will
10:51:18 8 be keeping the postcard list current, and so any party who
10:51:25 9 has a document that they're going to serve on others through
10:51:29 10 the postcard service method, my understanding is that they
10:51:34 11 would contact the court for the up-to-date service list and
10:51:39 12 proceed accordingly with that for the mailing portion and
10:51:43 13 the e-mail portion of the service, and that that -- we had
10:51:48 14 contemplate it earlier, but the court would maintain it
10:51:52 15 because the court gets all these notices, not the parties, of
10:51:55 16 course.

10:51:55 17 JUDGE DU: Is there a reason why the list is not
10:51:57 18 posted on the website and updated so there's no need for any
10:52:00 19 party to contact the court to get the list?

10:52:04 20 MAGISTRATE JUDGE COBB: Probably because it's
10:52:05 21 not a document that's filed into CM/ECF on the case. I don't
10:52:11 22 think Ms. Griffin is here in the courtroom. She might be able
10:52:14 23 to better elaborate. But, I think maybe you might want to
10:52:17 24 defer that for discussion at our next Status Conference among
10:52:22 25 counsel and the Court, for us to try and figure out what we're

10:52:25 1 doing about notification to parties who have changed.

10:52:29 2 As you all may recall, Judge Du, in her order of
10:52:34 3 August 7th, encouraged people who are receiving service by
10:52:39 4 mail to opt for e-mail, and I just don't think we have a
10:52:44 5 cogent process to let everyone else know about when I said
10:52:48 6 John Doe, as an example, goes from service by postcard
10:52:53 7 to service by e-mail. And that's something I think,
10:52:57 8 logistically, we can work out later if you'd like.

10:53:00 9 THE COURT: But when we get the notice to
10:53:02 10 request a change from service by mail to service by e-mail,
10:53:05 11 that's filed with the court, so that's available to all the
10:53:09 12 parties on the docket.

10:53:10 13 Don't you all receive a copy of that request on ECF?

10:53:13 14 MR. GUARINO: Your Honor, Guss Guarino.

10:53:16 15 Yes. All the attorneys receive a copy of that when
10:53:19 16 it's filed with the court because it comes through on CM/ECF,
10:53:24 17 so we're notified.

10:53:24 18 JUDGE DU: Okay. So that notice is done that
10:53:26 19 way, and my thought is if -- so my overall concern -- I
10:53:29 20 understand the parties' concern about mailing and I appreciate
10:53:31 21 the superseding order -- I'm also concerned learning this new
10:53:35 22 -- as to the burden on the clerk's office staff in sending out
10:53:40 23 the Court's order.

10:53:41 24 MR. GUARINO: Yes.

10:53:42 25 JUDGE DU: So I think we should find a way to

10:53:45 1 address not just the parties' filings, but orders from the
10:53:50 2 Court, so that the orders may also be posted on the website.
10:53:54 3 Of course everything is always going to be docketed on CM/ECF,
10:53:58 4 but that an additional notice is given on the Court's website,
10:54:03 5 so that the clerk's office wouldn't have to send out these
10:54:07 6 orders, or every order that's issued, one.

10:54:12 7 Two, if the clerk's office is maintaining an
10:54:15 8 internal list, I don't see why we can't post that list on
10:54:19 9 the website. So I will ask that question, and perhaps the
10:54:23 10 information can be explored at the next Status Conference,
10:54:26 11 so that any list that's maintained -- so counsel wouldn't
10:54:30 12 have to have your staff call the clerk's office every
10:54:34 13 time that you have to send out a notice. I think that's
10:54:37 14 burdensome.

10:54:38 15 MR. GUARINO: Yes. And Your Honor, I do think
10:54:41 16 that these are issues that Magistrate Judge Cobb and the
10:54:47 17 parties can certainly discuss at an upcoming -- any upcoming
10:54:54 18 Status Conference.

10:54:55 19 I would give us a chance to think about it. When
10:54:58 20 folks start talking about putting a list of e-mails up on
10:55:02 21 the website, I don't know if folks are concerned about,
10:55:06 22 you know, public -- you know, broad public access to a
10:55:10 23 consolidated list like that. I don't know. We can talk
10:55:14 24 about that and certainly come up with something that we think
10:55:17 25 is helpful that will address the Court's concerns.

10:55:21 1 JUDGE DU: Thank you.

10:55:22 2 Mr. DePaoli is at the podium. Is there a comment
10:55:25 3 you would like to share?

10:55:27 4 MR. DEPAOLI: Yes, Your Honor. Gordon DePaoli.

10:55:30 5 I agree that we need to refresh ourselves with how
10:55:33 6 we update the postcard notice list. And one of the things
10:55:38 7 that I think has never been entirely clear to me, is there are
10:55:41 8 a couple provisions in the superseding order which I think may
10:55:45 9 relieve the clerk's office from having to send out everything
10:55:49 10 to persons who are either unrepresented parties, who are
10:55:54 11 non-appearing parties under Rule 5. My recollection and
10:55:59 12 reading of the order is that if someone did not, whether
10:56:03 13 they're unrepresented and have appeared, or if they're not
10:56:06 14 appearing, if they did not elect a method of service, they
10:56:09 15 were not going -- they were told they were not going to be
10:56:12 16 receiving any further actual written notice, and that it will
10:56:15 17 be their obligation to check the website periodically to see
10:56:20 18 what's going on. And as to that, I would refer to paragraph 9
10:56:24 19 of the superseding order and paragraph 15 of the superseding
10:56:28 20 order.

10:56:29 21 MAGISTRATE JUDGE COBB: I think you're right,
10:56:31 22 Mr. DePaoli. Those refer to -- we have three categories of
10:56:35 23 litigants. We have those who are represented by counsel.
10:56:37 24 We have those who are unrepresented parties who opted to
10:56:41 25 participate in the case, but do not have an attorney. Those

10:56:45 1 are the unrepresented parties. And they either get service
10:56:50 2 by e-mail, if they opted for that, or service by postcard.

10:56:53 3 And then you have a last category now, the
10:56:56 4 unresponsive parties -- or I forgot exactly how we
10:57:02 5 characterized them -- and they have an obligation now to
10:57:05 6 just go check the website and they don't get service.

10:57:08 7 MR. DEPAOLI: And in addition, unrepresented
10:57:10 8 parties who failed to make an election also have that
10:57:13 9 obligation, it is my recollection.

10:57:15 10 JUDGE DU: You're right. That's in paragraph 9
10:57:18 11 of the order.

10:57:18 12 And I don't know what list the clerk's office has.
10:57:21 13 I just know it costs about \$300 to mail, in postage, to send
10:57:26 14 out the orders each time I issue an order. I didn't want that
10:57:30 15 to be the case for the clerk's office.

10:57:32 16 But, thank you for that clarification. And I will
10:57:34 17 inquire to see what list, what mailing list is currently
10:57:38 18 maintained of those parties who elected not -- well, I don't
10:57:44 19 know if they are parties who have made an appearance, but who
10:57:49 20 have elected not to receive e-mail service. I just have to
10:57:52 21 make that inquiry. But, I agree, the superseding order should
10:57:57 22 be revisited.

10:57:59 23 MR. GUARINO: We can do that, Your Honor. This
10:58:01 24 is Guss Guarino.

10:58:02 25 JUDGE DU: And while we're on the service issue,

10:58:04 1 so there's some outstanding motions that, perhaps, this may be
10:58:08 2 a good time for me to address because the remaining issues I
10:58:11 3 see are issues that Judge Cobb will address; and that is, that
10:58:17 4 I have several motions that were filed -- or requests that
10:58:21 5 were filed in response to the order asking the parties to
10:58:23 6 elect e-mail service. This is the order that Judge Cobb had
10:58:28 7 just referenced. It's ECF 2325 that I had issued in August.

10:58:34 8 There is a request from the Kirk White Trust and
10:58:44 9 Cathy Trust, docket 2342, requesting removal from the mailing
10:58:48 10 list because the Trust has not owned the relevant property for
10:58:53 11 15 years.

10:58:59 12 A similar motion from Judith Robinson, docket
10:59:04 13 number 2343, requesting that they no longer be provided
10:59:10 14 service because the -- or there's a change in ownership.
10:59:17 15 Judith Robinson no longer owns the property and, apparently,
10:59:20 16 the current owner is Jeff Loda, who would like notice.

10:59:26 17 2344 is a motion -- request by Jesse Nish, who no
10:59:32 18 longer has the property in Nevada.

10:59:35 19 2376 relates to the same issue of the party having
10:59:45 20 moved.

10:59:47 21 2381 requests a change in who receives notice.

10:59:54 22 And then 20 -- I think I missed one -- 2359, request
10:59:58 23 for the address of the property associated with the family
11:00:02 24 trust.

11:00:02 25 I'm inclined to grant all these requests because I

11:00:05 1 didn't see any responses to them.

11:00:07 2 Is there any objection to the Court granting these
11:00:11 3 requests?

11:00:12 4 MR. GUARINO: Your Honor, Guss Guarino, for
11:00:14 5 the United States.

11:00:14 6 We don't have an objection to people requesting to
11:00:19 7 be dropped off from the service list for whatever reason they
11:00:23 8 have, we have effectuated service on the individual who owned
11:00:26 9 the property, and held the interest as identified by the
11:00:30 10 Case Management Order of 2000. They have been so served and
11:00:36 11 joined. And to the extent, to the extent they transferred
11:00:39 12 the property, we believe that such service is binding, and
11:00:43 13 notice is binding upon heirs and assigns. If they don't
11:00:47 14 want to receive any more because they don't own the property
11:00:50 15 anymore, we don't have an objection. But, to be clear, the
11:00:55 16 notice does not become stale because somebody has transferred
11:01:00 17 their property interests in the basin onto somebody else. And
11:01:03 18 those people who currently own the -- any sort of interest are
11:01:07 19 more than welcome to become more involved in the litigation,
11:01:12 20 or less involved in the litigation as they so choose.

11:01:16 21 JUDGE DU: No, I understand the United States'
11:01:18 22 position, but my concern is in these requests, for example,
11:01:25 23 ECF 2342 -- well, let me -- my granting these requests would
11:01:34 24 not address the issue you are raising.

11:01:34 25 MR. GUARINO: Yes.

11:01:36 1 THE COURT: Granting the request would purely
 11:01:38 2 grant the request to be taken off the service list.

11:01:41 3 MR. GUARINO: Yes.

11:01:41 4 JUDGE DU: You are referring to an entirely
 11:01:43 5 different issue; and that is, the obligation to serve the
 11:01:51 6 existing property owner would have already been effectuated
 11:01:55 7 by service on the owners of record at the time of service, is
 11:01:59 8 what you're referring to.

11:02:00 9 Am I right.

11:02:02 10 MR. GUARINO: It's related. Yes, Your Honor.

11:02:04 11 JUDGE DU: And that, to me, is a separate issue
 11:02:07 12 than what I have to address in these pending motions. For you
 11:02:11 13 to ask for me to make the decision granting the ruling that
 11:02:16 14 you request, I think that would have to be addressed via a
 11:02:19 15 separate motion.

11:02:21 16 MR. GUARINO: Your Honor, that's -- the Court
 11:02:24 17 started off by, you know, raising these docket numbers and the
 11:02:28 18 requests that were coming in. The Court is absolutely correct
 11:02:32 19 that the United States has no objection to the request that
 11:02:35 20 may have com in. For the record, I simply pointed out the
 11:02:38 21 only related issue that the United States had associated with
 11:02:42 22 these, sort of, transfers, and keeping in mind that the United
 11:02:47 23 States service efforts are completed in this case.

11:02:51 24 JUDGE DU: And I hadn't thought about that
 11:02:52 25 potential effect, and perhaps that's an issue that you can

11:02:56 1 raise in a separate motion. But, I'm going to grant the
11:03:00 2 requests of these individuals to be removed from the service
11:03:02 3 list for now, at least, and whether or not that satisfies
11:03:07 4 the United States' obligation under Rule 4 is a separate
11:03:10 5 issue.

11:03:13 6 But Mr. DePaoli has returned to the lectern, so I'm
11:03:16 7 going let him offer his comment.

11:03:18 8 MR. DEPAOLI: Gordon DePaoli, Your Honor. I
11:03:20 9 would just --

11:03:20 10 JUDGE DU: And I'm sorry. Mr. DePaoli, who do
11:03:22 11 you represent again?

11:03:23 12 MR. DEPAOLI: Walker River Irrigation District.

11:03:25 13 JUDGE DU: Thank you.

11:03:26 14 MR. DEPAOLI: My recollection, Your Honor, is
11:03:28 15 that the service documents included a requirement that when
11:03:33 16 and if ownership of property changed, there was a requirement
11:03:36 17 to submit a Notice of Change of Ownership. And I suspect
11:03:41 18 that from what Your Honor read as to at least one or two of
11:03:46 19 those, that the reason wanting to be deleted was a change in
11:03:51 20 ownership, and I do not know whether there has ever been a
11:03:56 21 notice submitted by that party, or those parties, of who the
11:04:00 22 new owners are. But, that was the concept that was adopted
11:04:04 23 to deal with changes of ownership over time, in lieu of the --
11:04:12 24 a lis pendens being filed or recorded in the counties where
11:04:14 25 all these properties are located.

11:04:17 1 And I only point that out to indicate that we may
11:04:23 2 need to review what was required there as well, so that we can
11:04:27 3 see if anything else needs to be done as to those changes in
11:04:31 4 ownership.

11:04:32 5 JUDGE DU: Thank you, Mr. DePaoli.

11:04:33 6 Mr. Herskovits.

11:04:39 7 MR. HERSKOVITS: Yes. Excuse me, Your Honor,
11:04:44 8 but just to clarify. The issue that Mr. Guarino may,
11:04:48 9 inadvertently, may have alluded to, was actually resolved
11:04:52 10 by Judge Reed in this case, in both the 125 -- sorry -- 127
11:04:57 11 and 128 sub-proceedings on the fundamental requirements of
11:05:02 12 service, and the binding nature of service on an existing
11:05:06 13 water right owner with regard to that water right owner's
11:05:11 14 successors or assigns or heirs.

11:05:14 15 So there is an order, and there is law of the case
11:05:16 16 on the nature of the binding effect of service, proper Rule 4
11:05:22 17 service, on the successors in interest to the water right
11:05:26 18 holder who was served. And that is in the docket. I don't
11:05:29 19 have the docket number right now at my fingertips, but I
11:05:33 20 believe it was in 2012 that Judge Reed issued that order.
11:05:38 21 Judge Reed preceded Judge Jones, is the --

11:05:40 22 JUDGE DU: No. I understand that. I realized
11:05:42 23 that immediately, when Mr. DePaoli indicated that the service
11:05:46 24 requirement had included the requirement that a Notice of
11:05:52 25 Change in Ownership has to be filed with the court, which, to

11:05:56 1 me, means that I have to delay granting these requests until I
11:05:59 2 look at those orders because it would -- obviously, whatever
11:06:06 3 orders were issued previously would govern in a case. And if
11:06:09 4 the parties who are filing the request to be removed from
11:06:12 5 the list for the reason of a change in ownership, but they
11:06:16 6 haven't filed a Notice of Transfer of Ownership, then they
11:06:19 7 have to understand the effect of that request as well.

11:06:23 8 So, I just need to take a look at the relative
11:06:26 9 orders. And perhaps the parties could help me by filing -- if
11:06:29 10 you find out what that order number is, given that we are in
11:06:34 11 the 2000s in terms of dockets -- you know what, I can find
11:06:39 12 the order. I will find the order and I will determine how to
11:06:43 13 prepare an order to address the pending motions.

11:06:46 14 MR. HERSKOVITS: Certainly, Your Honor. It's
11:06:48 15 very easy to find that docket number. I just don't happen to
11:06:52 16 have it with me today.

11:06:53 17 JUDGE DU: Thank you.

11:06:54 18 MR. GUARINO: Your Honor, Guss Guarino for
11:06:56 19 the United States.

11:06:56 20 This could be another item, if the Court prefers,
11:06:58 21 to have the magistrate judge and the parties address in their
11:07:04 22 Status Conference in the future.

11:07:11 23 JUDGE DU: Well, I don't want to put everything
11:07:13 24 on Judge Cobb if I can help it.

11:07:16 25 MAGISTRATE JUDGE COBB: Well, I would really be

11:07:18 1 interested in anyone had a cite for Judge Reed's 2012 order.

11:07:23 2 Scrolling, my iPad takes me a while to scroll through and I'm

11:07:28 3 still in 2015 here.

11:07:44 4 Mr. Herskovits, you think it was 2012?

11:07:47 5 MR. HERSKOVITS: Yes, Magistrate Judge Cobb.

11:07:49 6 I believe it was either 2012 or 2013. And my colleague,

11:07:54 7 Ms. Thornton, maybe since she's in the office before her

11:07:58 8 computer, she may be able to quickly look it up for us. I

11:08:02 9 also could open my laptop and look it up.

11:08:09 10 JUDGE DU: Well, normally, I can do a search,

11:08:15 11 but I don't know what query I could put in to eliminate

11:08:19 12 pulling in more documents than I need to. If I put "order,"

11:08:22 13 I would get a lot of orders.

11:08:24 14 MR. HERSKOVITS: Your Honor, in the 128 case, it

11:08:26 15 is document number 592.

11:08:28 16 JUDGE DU: 592?

11:08:28 17 MAGISTRATE JUDGE COBB: What was the date of

11:08:30 18 that?

11:08:31 19 MR. HERSKOVITS: The date is April 23rd, 2012.

11:08:36 20 THE CLERK: Your Honor, it is 1711.

11:08:41 21 JUDGE DU: Thank you.

11:08:41 22 MAGISTRATE JUDGE COBB: 1711?

11:08:42 23 THE CLERK: Yes, sir.

11:08:55 24 MAGISTRATE JUDGE COBB: It's a 27-page order.

11:09:17 25 JUDGE DU: Well, I think this issue can be

11:09:19 1 addressed at a later point in time. And maybe I will, I will
11:09:24 2 trouble Judge Cobb, and have the parties confer on the issue
11:09:33 3 of successor in interest as indicated in docket number 1711,
11:09:38 4 and file a proposed order with the Court to address the
11:09:43 5 pending motions. And when you file the proposed order,
11:09:45 6 if you would also e-mail a Word version to my courtroom
11:09:49 7 administrator for me to modify, if I need to modify the
11:09:55 8 proposed order.

11:09:56 9 Would 30 days be enough time?

11:10:00 10 (No response.)

11:10:01 11 JUDGE DU: All right. Within 30 days then, to
11:10:02 12 file a proposed order with the Court to address the pending
11:10:05 13 motions and the service issue as well, for parties who are
11:10:09 14 now new owners to the property.

11:10:11 15 MAGISTRATE JUDGE COBB: Judge Du, maybe
11:10:13 16 Mr. DePaoli might be more knowledgeable about this so we can
11:10:16 17 resolve it now, because Judge Reed overruled Walker River
11:10:21 18 Irrigation District's objections to the successor in interest
11:10:24 19 orders that preceded this particular order.

11:10:29 20 So, do you remember what the impact was of his order
11:10:32 21 in April of 2012?

11:10:38 22 MR. DEPAOLI: Gordon DePaoli.

11:10:44 23 Not completely, Your Honor. But, I do recall that
11:10:49 24 the issue was the extent to which successors in interest who
11:10:55 25 had no actual knowledge of the proceedings, and who had no

11:11:02 1 constructive knowledge of the proceedings because a decision
11:11:05 2 was made not to record lis pendens, would they, nevertheless,
11:11:11 3 under Rule 25, be bound by any outcome? And Judge Reed, in
11:11:15 4 that order, ruled that they would be bound, as I recall. I
11:11:23 5 still don't agree with that, but that was his ruling.

11:11:26 6 MAGISTRATE JUDGE COBB: Well, do you need
11:11:27 7 another order in light of what Judge Reed ruled and what
11:11:30 8 Mr. DePaoli just described?

11:11:31 9 JUDGE DU: Well, I'm not suggesting -- so, to be
11:11:34 10 clear, I'm not asking for another order on the successor in
11:11:38 11 interest issue. I'm asking for a proposed order granting
11:11:41 12 the pending motions, and addressing the issue of the United
11:11:50 13 States' satisfaction of its service obligation, in light of
11:11:53 14 Judge Reed's order. So, I need the precise language. I'm
11:11:57 15 not revisiting the issue of successor in interest, to be
11:12:01 16 clear.

11:12:02 17 Mr. Herskovits.

11:12:03 18 MR. HERSKOVITS: Yes, Your Honor. I think
11:12:06 19 that's perfectly clear.

11:12:07 20 And let me just point out that, Magistrate Judge
11:12:12 21 Cobb, when you refer to the order from April of 2012 as
11:12:17 22 overruling or denying certain objections from the Walker River
11:12:22 23 Irrigation District to a preceding order, that was your
11:12:25 24 predecessor, Magistrate Judge Leavitt, who ruled initially on
11:12:29 25 the motions that were concerning the successor in interest

11:12:32 1 issue regarding service. So, that then was brought before
11:12:36 2 Judge Reed. There was a hearing at that time -- actually,
11:12:39 3 Judge Jones presided over the hearing, even though he was not
11:12:44 4 yet assigned the case, and Judge Reed then issued that order
11:12:47 5 that you are looking at, the April 2012 order.

11:12:50 6 So, it was largely an order affirming or confirming
11:12:58 7 and modifying what Judge Leavitt, Magistrate Judge Leavitt, if
11:13:02 8 you'll pardon me -- had already issued as his initial ruling
11:13:05 9 on the motions -- or the motion relating to successors in
11:13:08 10 interest under Rule 4 service.

11:13:10 11 Now, if I may just quickly suggest that perhaps
11:13:15 12 Mr. Guarino, who seemed to have an idea in mind in relation
11:13:19 13 to the pending requests or motions regarding removal from
11:13:23 14 the service list, I would suggest that Mr. Guarino may have
11:13:26 15 something in mind that he could propose or circulate among
11:13:29 16 the parties as a proposed order, which we would then file with
11:13:33 17 the Court.

11:13:33 18 JUDGE DU: Thank you.

11:13:34 19 So I am looking at -- I was thinking about this
11:13:37 20 too -- Local Rule 7-2F addresses proposed orders to prevailing
11:13:47 21 parties. I'm going to ask Mr. Guarino to follow that Local
11:13:54 22 Rule and prepare proposed orders for me to grant the pending
11:13:58 23 motions. And the Local Rule provides that you have to
11:14:04 24 serve on the -- well, we're circling back to the issue of
11:14:06 25 service, so let me just modify the Local Rule for -- let me

11:14:10 1 just do this. I'm not going to rely on the Local Rule. I'm
11:14:13 2 going to ask counsel, Mr. Guarino, to prepare a proposed order
11:14:16 3 for me to grant the pending motions, and circulate them to the
11:14:23 4 parties who are represented by counsel in this case.

11:14:29 5 MR. GUARINO: Your Honor, Guss Guarino for the
11:14:31 6 United States.

11:14:31 7 Mr. Herskovits can tend to read my mind at times. I
11:14:36 8 can do that.

11:14:36 9 JUDGE DU: Well, I'm going to give you a time
11:14:38 10 frame, that you do so, and give the parties seven days to
11:14:42 11 provide comments to you, and when you file the proposed order
11:14:45 12 with the Court, you just indicate whether or not that you have
11:14:48 13 served the proposed order, and whether any comments were
11:14:52 14 received or not received, so that I know if there's any
11:14:58 15 objection to the order when the proposed order is submitted.

11:15:01 16 MR. GUARINO: I can do that, Your Honor.

11:15:04 17 JUDGE DU: And the proposed order should address
11:15:07 18 your concern about the effect of the Court granting the motion
11:15:11 19 to remove parties who are no longer property owners from the
11:15:14 20 service list, to the extent they have not filed any notice of
11:15:17 21 transfer of property.

11:15:22 22 MR. GUARINO: Okay.

11:15:23 23 JUDGE DU: Thank you.

11:15:27 24 MR. GUARINO: All right. Would the Court like
11:15:32 25 to proceed to item number four?

11:15:35 1 JUDGE DU: Yes.

11:15:37 2 MR. GUARINO: Great. Guss Guarino for the
11:15:37 3 United States.

11:15:38 4 So item number four is my -- is our characterization
11:15:49 5 of, sort of, where we are in the litigation itself, here in
11:15:53 6 the 127 case. I would suppose I would describe that as the
11:15:57 7 meat of the matter for the United States' claims purposes.

11:16:02 8 So in -- just for a little bit of background and
11:16:07 9 history, Your Honor -- in nineteen, in the early 1990s,
11:16:10 10 the Walker River Indian Paiute Tribe filed a response and
11:16:19 11 counterclaim to a petition that was filed by the Walker River
11:16:26 12 Irrigation District that sparked the 125A case. I believe
11:16:31 13 that the number of that sub-proceeding was 126, ultimately
11:16:38 14 assigned 126. And in that counterclaim, the Walker River
11:16:44 15 Indian Paiute Tribe asserted, essentially, three water rights,
11:16:49 16 if I recall correctly. I don't have a copy of the 1990
11:16:53 17 pleading right in front of me. But generally speaking, after
11:16:56 18 they filed that proceed -- after they filed that petition, the
11:17:01 19 Court turned to the United States and asked the United States
11:17:03 20 if the United States was joining the Tribe's claim for a water
11:17:11 21 right, as the United States holds reserved water rights in
11:17:15 22 trust for Indian tribes and it is, of course, important to
11:17:17 23 get the United States' views on whether or not it believes
11:17:21 24 that there's a water right claim on behalf of the Tribe.

11:17:24 25 And so the United States responded by also issuing

11:17:30 1 its response to the petition and counterclaims. And that's
11:17:34 2 why, in this case, you're going to probably hear a lot
11:17:37 3 of people refer to the claims of the United States as
11:17:40 4 counterclaims. It's from the particular procedural
11:17:46 5 circumstances that occurred back in the early '90s, late '80s
11:17:50 6 or early '90s, and the case has evolved since then.

11:17:56 7 In pursuing the counterclaims that the United
11:17:59 8 States -- or claims the United States then decided that it
11:18:02 9 was going to assert on behalf of the Tribe, the United States
11:18:05 10 began to investigate further into the water rights of the
11:18:11 11 United States that might exist throughout the basin, not just
11:18:14 12 associated with the Walker River Paiute Tribe. And the United
11:18:18 13 States identified that there were a host of federal interests
11:18:23 14 in the basin, and a host of federal agencies beyond the
11:18:29 15 Department of Interior, Bureau of Indian Affairs. And in
11:18:33 16 fact, there were other Indian interests that were beyond even
11:18:37 17 the Walker River Indian Paiute Tribe. There were other tribes
11:18:43 18 and other tribal interests, allotments that are specialties
11:18:49 19 of the property held in trust for individuals, held in trust
11:18:54 20 by the United States, and continue to be held in trust by
11:18:57 21 the United States, into this modern age, it's a very unique
11:19:01 22 element of Indian law that these in-holdings existed and
11:19:06 23 continue today. But in addition, as Mr. Negri described at
11:19:11 24 the very beginning of this hearing, there's a number of water
11:19:14 25 rights claims that the United States identified that were

11:19:16 1 associating with its other federal interests.

11:19:20 2 Now -- so, the United States made the decision
11:19:25 3 back in the '90s, that it needed to amend its counterclaims,
11:19:32 4 the ones that it had asserted on behalf of only the Walker
11:19:37 5 River Indian Paiute Tribe. And so it asserted a number -- I
11:19:39 6 believe it's a, in total, 11; so, that would be eight more
11:19:43 7 specific claims on behalf of other specific federal agencies.

11:19:48 8 Since those claims were filed, the Court
11:19:55 9 subsequently issued the Case Management Order 108, in which
11:20:01 10 the Court declared that it was going to bifurcate the claims
11:20:08 11 at that point. And we're going to look at them separately.
11:20:11 12 We're going to break them up. There's a lot of them here.
11:20:15 13 Let's take a look at something that's workable. And the focus
11:20:18 14 was always, initially, there are claims -- the three claims,
11:20:22 15 the three marked claims associated on behalf -- associated
11:20:24 16 with the Tribe claim on behalf of the United States trust
11:20:28 17 responsibility. And then the other claims -- so that would
11:20:31 18 be the first group that the Court would focus on, and then
11:20:35 19 there's the second group, which is everything else. All the
11:20:38 20 other Indian interests that the United States might have
11:20:41 21 associated with other tribes and allotments; and, the other
11:20:46 22 federal agency interests that might be out there on which
11:20:50 23 the United States asserted a water right claim.

11:20:54 24 And so that bifurcation continues today, and the
11:21:01 25 United States assumes that it will continue going forward.

11:21:06 1 When the May -- when the May of 2015 order came in --

11:21:14 2 MAGISTRATE JUDGE COBB: Mr. Guarino, this is
11:21:17 3 Judge Cobb. Just as far as nomenclature goes, we might note
11:21:22 4 that the Walker Tribe claims were just generally referred to
11:21:27 5 as "the tribal claims," and all the others were characterized
11:21:30 6 by Judge Reed as what he called "the federal claims."

11:21:33 7 So, I just want to make note of that --

11:21:35 8 MR. GUARINO: Okay.

11:21:35 9 MAGISTRATE JUDGE COBB: -- characterization.

11:21:36 10 MR. GUARINO: Nomenclature in this case,
11:21:41 11 Magistrate Judge Cobb, is very important. I appreciate
11:21:43 12 that.

11:21:43 13 Yes. So the tribal claims for the Tribe, in May,
11:21:49 14 in May of 2015, when the Court issued its order dismissing
11:21:56 15 the claims, it dismissed everything. It dismissed the tribal
11:22:01 16 claims. It dismissed the claims -- all the other claims
11:22:04 17 associated with the United States. Everything was dismissed.
11:22:08 18 Obviously, that was reversed by the Ninth Circuit and here we
11:22:13 19 are today.

11:22:13 20 But it's -- the Court needs to be aware, at the time
11:22:18 21 that the order came down, the United States was in the process
11:22:21 22 of moving forward in the litigation. We were engaged with
11:22:27 23 experts. We were engaged with the agency. We were, um,
11:22:32 24 anticipating what was next, anticipating that there would
11:22:36 25 be -- the United States tribal claims would survive, as they

11:22:43 1 weren't really the subject of the motion to dismiss, but that
11:22:46 2 they would proceed into litigation. When the Court dismissed
11:22:51 3 everything, and we had no claims left in the basin by order
11:22:56 4 of the Court, it put a halt on our efforts to build the
11:23:05 5 litigation case on behalf of the tribes, and so -- but now
11:23:09 6 with the reversal of the Ninth Circuit, as soon as we were
11:23:13 7 notified that the decision was reversed and remanded back
11:23:15 8 to the Court, we immediately started engaging with our agency
11:23:18 9 again. We immediately started engaging with our contractors,
11:23:23 10 engaging with our personnel, basically, as I describe it,
11:23:27 11 judge, just loosely, to restart the engines.

11:23:31 12 And so it's a, I can assure the Court that it is a
11:23:36 13 long process to get these engines started, especially on
11:23:40 14 something like this. It takes a great deal of resources
11:23:44 15 pulled together within a budgetary cycle, and it takes a
11:23:48 16 great deal of effort to get contracts in place, to get people
11:23:52 17 back in line, to get people back into a position so that they
11:23:55 18 can engage in work on behalf of the United States. When
11:23:59 19 (unintelligible) came back, we immediately started that
11:24:00 20 process. It's a very slow process.

11:24:04 21 I've been informed by my colleagues at the agencies
11:24:07 22 who fund these litigation activities, that the request had
11:24:13 23 been put into place, the contractors have been notified and
11:24:21 24 stand at the ready. We believe that we'll have at least the
11:24:24 25 financial resources -- we hope that the financial resources

11:24:28 1 will be in place to reengage our contracting contract work by
11:24:32 2 the end of this year. And that by the beginning of next year,
11:24:37 3 they can resume their work to take, take the tribal claims --
11:24:46 4 and I'm specifically speaking of the tribal claims only
11:24:49 5 because that was the focus that we had in 2015 -- to a
11:24:52 6 litigation position.

11:24:55 7 I can inform the Court that my job within the
11:24:57 8 Department of Justice is to litigate Indian water rights
11:25:02 9 claims throughout the west. That's all I do. I engage in
11:25:05 10 water rights adjudications, the water rights claims on behalf
11:25:09 11 of the tribes throughout the west. This is one of those
11:25:12 12 examples. Typically the way it works, in my experience, is
11:25:16 13 that the water rights claims, when we approach the litigation
11:25:21 14 position, has been there will be no resolution between the
11:25:24 15 parties, there will be no settlement between the parties, that
11:25:27 16 the claims of the United States will be resolved through a
11:25:30 17 litigated process. That we, before the litigation process
11:25:36 18 is engaged fully, that the United States files an amended
11:25:40 19 specific statement of claimant concerning the water rights
11:25:43 20 claims asserted, in which we give a great bit of detail, a
11:25:48 21 great bit more detail than we already have given. The claims
11:25:51 22 that were filed that are currently pending before the Court
11:25:54 23 are described, generally speaking, in the counterclaims filed
11:25:57 24 i the early 1990s, I think it was 1990, 1994 -- restated in
11:26:04 25 1994 with amendment.

11:26:06 1 But as we approach a litigation resolution, we
11:26:11 2 typically file an amended statement of claimant that's more
11:26:16 3 detailed, and has the specific water rights claimants of
11:26:20 4 the United States asserted and, from there, we then proceed
11:26:24 5 towards preparing and presenting our Rule 26 expert reports,
11:26:30 6 discovery, motions for summary judgment, that sort of thing
11:26:35 7 in a regular litigative context.

11:26:39 8 I can tell the Court that based upon our efforts to
11:26:42 9 get our financial, financial and personnel resources in
11:26:49 10 order -- as I described, the financial resources should be
11:26:55 11 formed and in place by the end of this year, and I would
11:26:58 12 anticipate given the amount of work that our engineers and
11:27:02 13 our experts need to engage in, it will take approximately a
11:27:08 14 year to -- thereafter, to get to a point where we are in a
11:27:11 15 position to articulate to the Court the statement of claimant
11:27:18 16 and then proceed towards litigation. That's with respect to
11:27:22 17 the tribal claims.

11:27:22 18 The federal claims, otherwise, continue to be
11:27:25 19 pending before the Court but, obviously, they're not the
11:27:30 20 specific attention of the Court, given the bifurcation that
11:27:33 21 the Court previously described.

11:27:37 22 If the Court would like to hear anymore detail about
11:27:39 23 the other federal claims that are pending before the Court,
11:27:44 24 Mr. Negri, of course, as he described at the beginning, is the
11:27:48 25 principal attorney responsible for those.

11:27:51 1 Does the Court have any questions with what I've
11:27:54 2 described so far?

11:27:55 3 JUDGE DU: I do not.

11:27:56 4 Judge Cobb?

11:27:57 5 MAGISTRATE JUDGE COBB: I would like to
11:27:58 6 hear from Mr. Negri, but I think what you're saying is that
11:28:02 7 you want to proceed with litigation, which would include
11:28:05 8 discovery, presumably, relative to the tribal claims. But
11:28:10 9 what I'm hearing from you, you seem to be carving out
11:28:13 10 proceeding on the federal claims at the same time, and I
11:28:20 11 guess we might want to hear on that from Mr. Negri about his
11:28:24 12 position.

11:28:26 13 MR. GUARINO: Magistrate Judge Cobb -- Guss
11:28:29 14 Guarino for the, United States -- I wasn't suggesting that
11:28:32 15 we're proceeding simultaneously with the federal claims.
11:28:34 16 I was suggesting that what has been presented before is a
11:28:37 17 sequential addressing of the claims, and we do not, we do not
11:28:42 18 intend to deviate from that. That is a -- that specific --
11:28:46 19 that, we don't plan to do that. That would be much different
11:28:52 20 than what we have in mind.

11:28:54 21 MAGISTRATE JUDGE COBB: Well, do you think
11:28:56 22 Judge Reed made a distinction moving from Phase One to Phase
11:28:59 23 Two, that Phase Two would not include the federal claims?

11:29:04 24 MR. GUARINO: Yes.

11:29:06 25 MAGISTRATE JUDGE COBB: Okay. Well, I wasn't

11:29:08 1 aware of that interpretation.

11:29:09 2 Mr. Negri.

11:29:10 3 MR. NEGRI: Your Honor, thank you. David Negri,
11:29:16 4 Department of Justice, for the United States.

11:29:18 5 Yes. We agree with Mr. Guarino. Obviously, that's
11:29:22 6 been my understanding throughout, that the entirety of the
11:29:25 7 litigation was bifurcated, that the game plan has been, for
11:29:29 8 a number of years now, to proceed with the claims of the
11:29:34 9 Walker River Paiute Indian Tribe first, and then the remaining
11:29:38 10 claims.

11:29:39 11 It's a little bit of a misnomer to call just the --
11:29:44 12 well, the other federal claims are a little bit of a misnomer
11:29:51 13 because there are some Indian allotment and other Indian
11:29:55 14 interest claims in there, as Mr. Guarino claimed. But
11:30:00 15 specifically, the claims of the Walker River Paiute Indian
11:30:05 16 Tribe were bifurcated first.

11:30:08 17 When we did -- when we -- the claims all got lumped
11:30:11 18 together for purpose of the Rule 12 motions, as I recall,
11:30:14 19 because, quite frankly, they were -- whoops. Excuse me --
11:30:17 20 there were, um -- there was some commonality of interest in
11:30:21 21 the potential arguments being made. But that's, essentially,
11:30:26 22 been the only, the only time my role in this case has sort
11:30:32 23 of come to the forefront at all. And that was, obviously, in
11:30:36 24 conjunction with Mr. Guarino as we fashioned our defenses to
11:30:40 25 those claims.

11:30:40 1 So, at least my understanding coming into the Status
11:30:44 2 Conference, is that consistent with the previous order, we
11:30:48 3 would proceed with the claims of the Walker River Paiute
11:30:52 4 Indian Tribe. And at some further point, when those claims
11:30:56 5 are determined, we would then discuss moving forward with
11:31:02 6 the remaining federal agency claims, which include, again,
11:31:06 7 certain Indian, other Indian claims also.

11:31:09 8 MAGISTRATE JUDGE COBB: Would those be triggered
11:31:12 9 after either summary judgment or a trial in this matter in the
11:31:15 10 year, what, 2025?

11:31:18 11 MR. NEGRI: Your Honor, as I -- I don't know
11:31:21 12 what year that would be --

11:31:24 13 MAGISTRATE JUDGE COBB: I was being facetious
11:31:26 14 there, but I don't -- I guess I have to read Judge Reed's
11:31:31 15 original CMO more closely. But, maybe I don't understand
11:31:37 16 the concept of segregating those claims in so far as moving
11:31:41 17 ahead.

11:31:41 18 MR. NEGRI: I think the concept, Your Honor --
11:31:43 19 and I believe, actually, the -- so I've been on this case
11:31:47 20 since 2002, 2003, perhaps. Mr. Guarino's predecessor,
11:31:55 21 Ms. Schneider, had been handling the Indian Resource Section
11:32:00 22 claims at that point. You know, and what happened was that
11:32:02 23 the focus throughout has been on the Paiute Indian Tribe
11:32:06 24 claims. My section was brought in about that time, when
11:32:10 25 the Indian Resources Section -- well, I mean, we, obviously,

11:32:14 1 have been involved in -- I think it was 1997, when the amended
11:32:17 2 counterclaims were filed, which included the federal agency
11:32:21 3 claims. I think there was a filing in '93 first, and then we
11:32:24 4 amended in '97. I don't recall if we added the federal agency
11:32:29 5 claims in '97 or '93.

11:32:31 6 But anyway, I believe that bifurcation order
11:32:34 7 happened even prior to my involvement. It's sort of been
11:32:38 8 my understanding throughout that, that the, what we call the
11:32:43 9 "tribal claims," would proceed to some sort of determination
11:32:47 10 first.

11:32:47 11 Now, obviously, I'm here and I'm available to do
11:32:52 12 certain things. And I'm working with my agencies and we've
11:32:55 13 been involved and we're looking at the agency interests.
11:32:58 14 Again, though, I think it was the understanding of all the
11:33:03 15 parties at a prior time with Judge Reed, that the tribal
11:33:09 16 claims would proceed to determination, or at least close
11:33:12 17 to determination before the other claims would go forth. At
11:33:19 18 least that's been my assumption throughout, Judge Cobb.

11:33:22 19 JUDGE DU: Well, I can see now in the CMO, that
11:33:24 20 Judge Reed talked about Phase One, being what was originally
11:33:28 21 considered to be threshold issues, which morphed into Rule 12
11:33:32 22 motions, which led to the order of dismissal and the reversal.
11:33:37 23 He talks about Phase Two now completion and determination of
11:33:41 24 the merits relating to the said tribal claims. This is all
11:33:44 25 at page 11 and 12. Then he goes on to state that: "The

11:33:53 1 additional phases will not be scheduled by the magistrate
11:33:56 2 judge, at least until the threshold issues, as set forth
11:34:01 3 above, have been decided on the merits. And the additional
11:34:07 4 phases shall include, but not be limited to all other issues
11:34:11 5 relating to the tribal claims" -- into paragraph C -- "all
11:34:15 6 issues related to the other federal claims."

11:34:20 7 So maybe rather than trying to resolve this
11:34:24 8 today, at our next Status Conference we have briefing, or a
11:34:27 9 discussion in some fashion, as to whether this case, moving
11:34:32 10 forward, should involve both the tribal claims and the federal
11:34:38 11 claims.

11:34:40 12 MR. NEGRI: Certainly available for that
11:34:43 13 discussion, Your Honor.

11:34:43 14 I, you know, I think, again, I think what happened
11:34:45 15 with the Rule 12 motions -- and Mr. Guarino and other counsel
11:34:48 16 can correct me if I'm wrong -- I think we actually reached
11:34:51 17 out, on the United States side, and suggested that those
11:34:54 18 motions include the other federal interests because we wanted
11:34:58 19 some clarity, legally, on our end also. I, I could have that
11:35:03 20 wrong, but that's my recollection.

11:35:05 21 But, I believe Judge Reed's original order
11:35:08 22 actually -- you know, again, he talked about these preliminary
11:35:13 23 issues, which then, kind of, morphed into Rule 12 motions with
11:35:18 24 time. I think he intended, Judge Reed, for that to just focus
11:35:23 25 on the tribal claims. And I think we reached out, on the

11:35:26 1 United States side, and suggested that they include all
11:35:30 2 federal interests at that point. So, we probably -- we
11:35:34 3 probably convoluted things a little bit there.

11:35:39 4 JUDGE DU: I do note though --

11:35:41 5 MR. GUARINO: Your Honor --

11:35:42 6 JUDGE DU: -- in Judge Reed's order, this is the
11:35:45 7 original Case Management Order, docket number 108, at page 4,
11:35:51 8 he ordered that "The tribal claims proceed in a bifurcated
11:35:57 9 manner, and that all discovery and other proceedings in this
11:36:00 10 action are stayed until further order of the Court, except as
11:36:04 11 provided in the order." And then the order provides for the
11:36:07 12 two phase process.

11:36:11 13 So, I think Judge Cobb's suggestions that the
11:36:15 14 parties consider these issues at another Status Conference
11:36:19 15 is a good idea.

11:36:20 16 I want to understand the reasons, if counsel recall,
11:36:23 17 for the bifurcation. Is it because it makes sense that there
11:36:27 18 may be some common legal issues that, if they are resolved in
11:36:31 19 a certain way with respect to the tribal claims, that they may
11:36:36 20 also resolve the federal claims?

11:36:39 21 MR. NEGRI: I, I think, Your Honor, what you,
11:36:42 22 what you just said is exactly why we, the United States,
11:36:51 23 suggested the Rule 12 motions include all federal interests
11:36:54 24 because there is some -- I mean, based on the issues raised in
11:36:57 25 those motions, it potentially affected, and did affect all

11:37:00 1 interests. You know, beyond that, the tribal bases for water
11:37:07 2 rights and federal agency bases are very different in some
11:37:15 3 ways, not least at all on the federal agency side, we have
11:37:19 4 a lot of state law based water rights, whereas -- and again,
11:37:25 5 Mr. Guarino would have to speak more closely to this -- there
11:37:29 6 may not be any of that nature on a water right on the, on the
11:37:35 7 tribal side. And again, I think -- again, I don't believe
11:37:40 8 I was there at the time, but I'm guessing, the whole idea
11:37:44 9 of the bifurcation was just simply this is a big pot of
11:37:47 10 litigation. Let's find some way to manage it sensibly for
11:37:52 11 everybody. And that ended up with Judge Reed's bifurcation
11:37:58 12 order.

11:37:58 13 Judge Du, I hope I responded to what you said. If I
11:38:01 14 didn't, please let me know and I will try better.

11:38:03 15 JUDGE DU: No. And I see that the parties
11:38:04 16 engaged in extensive motion practice that led to the Case
11:38:08 17 Management Order as well. So I'm sure there's a background
11:38:11 18 and a reason why Judge Reed thought that bifurcation was
11:38:14 19 appropriate.

11:38:17 20 Any more questions, judge -- I thought there was
11:38:19 21 someone else who tried to speak before I interrupted you.

11:38:23 22 Was it you, Mr. Guarino?

11:38:25 23 MR. GUARINO: I'm sorry, Your Honor. I was just
11:38:28 24 going to -- I thought Mr. Negri was done.

11:38:30 25 The only thing I would add is with, with

11:38:35 1 supplemental orders from the Court that had drawn out the
11:38:40 2 motion, 12B motions to dismiss and all the federal water
11:38:44 3 rights we got resolved, we're put in a position of where
11:38:48 4 federal reserve water rights typically fall, they're very,
11:38:54 5 they're very, uh, circumstance specific, that are very
11:38:59 6 disconnected from one another, and that's why they make them
11:39:05 7 rather unique for the Walker River Paiute Tribe water right
11:39:08 8 claims versus the Marine Corps water right claims. Those are
11:39:12 9 just completely different as a circumstantial basis that
11:39:18 10 justifies them sort of being considered differently and
11:39:22 11 separately. Mr. Negri was correct on all that.

11:39:25 12 MAGISTRATE JUDGE COBB: This is Judge Cobb
11:39:26 13 again. If everyone is of the mind that then we proceed
11:39:31 14 forward on this case, just with respect to the tribal claims,
11:39:37 15 and deferring, so to speak, the federal claim litigation or
11:39:40 16 discovery, then I don't think we need to address it further
11:39:43 17 at another case management conference. So, I would just ask
11:39:48 18 anyone to speak who thinks that the claims should proceed
11:39:52 19 simultaneously. Otherwise, I think we go with the approach
11:39:56 20 that Mr. Guarino and Mr. Negri have identified, of proceeding
11:40:01 21 forward, at this point in time, on the tribal claims alone.

11:40:04 22 (No response.)

11:40:08 23 MR. DEPAOLI: Gordon DePaoli, Your Honor,
11:40:14 24 on behalf of the Walker River Irrigation District.

11:40:17 25 I don't, necessarily, disagree. I do think that

11:40:23 1 it merits some discussion. And I would point out that the
11:40:27 2 supplemental Case Management Order deleted, in its entirety,
11:40:31 3 paragraph 12 of the original Case Management Order and,
11:40:35 4 essentially, substituted for it paragraph 6 of the subsequent
11:40:40 5 Case Management Order, which indicates that once Phase One is
11:40:45 6 completed, the Court would address issues related to filing
11:40:51 7 answers to the tribal claims, counterclaims, cross-claims,
11:40:55 8 discovery, dispositive motions, and trial; and, would also
11:40:58 9 subsequently address the additional phases related to the
11:41:01 10 federal claims.

11:41:03 11 My only -- the reason I am raising the issue, and
11:41:09 12 this will be coming up, I think, on another agenda item, but
11:41:13 13 when you get around to discussing the need for answers,
11:41:17 14 cross-claims, and counterclaims, then we need to also think
11:41:21 15 about is that going to be just to the tribal claims, or is it
11:41:25 16 going to be to the tribal claims and the federal claims; and,
11:41:30 17 are there any relationships there that need to be considered?

11:41:35 18 So, I would, I think, agree with the idea that
11:41:39 19 perhaps we ought to think about this a little further and
11:41:44 20 discuss it at a Status Conference.

11:41:47 21 The bifurcation that Judge Reed instituted was,
11:41:50 22 essentially, a bifurcation that was moved for by the United
11:41:54 23 States and the Tribe at the time. And I think the order that
11:41:58 24 Judge Reed crafted had a lot to do, based on his thinking, as
11:42:03 25 to how the threshold issues would proceed, which it did not

11:42:08 1 proceed in the manner that he had in mind. So, I think it
11:42:11 2 would be good to take another look at that.

11:42:14 3 I'm not suggesting that we ought to proceed
11:42:17 4 simultaneously with the tribal claims and the federal claims,
11:42:21 5 but I do think, in light of where we are today, we ought to
11:42:24 6 at least look at what overlap there is there and try to figure
11:42:29 7 out how to proceed efficiently with both.

11:43:14 8 MAGISTRATE JUDGE COBB: I just -- my one comment
11:43:15 9 is then I presume that perhaps at the next Status Conference,
11:43:19 10 the parties should address the timing and sequencing set
11:43:23 11 forth in paragraph 6 of the supplemental CMO, at number 1865,
11:43:31 12 which does consider and contemplate the possibility of them
11:43:35 13 proceeding on separate tracks successively, or perhaps
11:43:39 14 simultaneously. And maybe the parties can reach a consensus
11:43:44 15 of how it may be felt best to proceed in this action.

11:43:51 16 Right now, I think based on the review of the
11:43:53 17 original CMO, and the modification by the supplemental CMO,
11:43:57 18 that it would proceed in the fashion identified by Mr. Negri
11:44:00 19 and Mr. Guarino, with just addressing tribal claims.

11:44:05 20 And Judge Du, if it meets your approval, I think the
11:44:09 21 order would be that unless somebody makes a motion to modify
11:44:15 22 either the original CMO or, more appropriately, the subsequent
11:44:19 23 CMO, that that's the battle plan in this case.

11:44:23 24 JUDGE DU: I agree with that. And I think that
11:44:25 25 the original Case Management Order gives the Court discretion

11:44:30 1 to determine when the remaining claims should proceed, or how
11:44:37 2 long it should stay pending resolution of the tribal claims.
11:44:41 3 But, for now, unless we receive a motion, I don't see a basis
11:44:46 4 for the Court to modify its earlier orders.

11:44:57 5 MAGISTRATE JUDGE COBB: Is the next question to
11:45:00 6 address, okay, what do we do now in moving forward with the
11:45:05 7 tribal claims? Is that our next topic to address?

11:45:09 8 MR. GUARINO: Your Honor, we looked at, on
11:45:14 9 the agenda, we can see item five is a broader statement, but
11:45:20 10 I think it encompasses what Magistrate Judge Cobb just
11:45:24 11 articulated. I will say that what I was trying to do in
11:45:27 12 articulating, sort of, where the tribal claims were, is to
11:45:31 13 get a sense of timing for what I think the, the way forward on
11:45:39 14 those tribal claims are. And specifically, it involved giving
11:45:45 15 the United States sufficient time to get itself back into a
11:45:51 16 position that it was in back in 2015, to be able to proceed
11:45:56 17 to a point at which we can articulate to the Court and all the
11:46:01 18 parties a more detailed amended statement of claimant. And
11:46:04 19 then, from there, be able to proceed with litigation. But,
11:46:09 20 it will take some time and I would ask the court to keep in
11:46:14 21 mind that it's going to probably take us the better part of a
11:46:18 22 year.

11:46:19 23 MAGISTRATE JUDGE COBB: I would anticipate that,
11:46:21 24 but should we ask the parties to meet and confer and prepare
11:46:27 25 the traditional Discovery Plan and Scheduling Order in so far

11:46:32 1 as moving ahead on the tribal claims on 127? That would be my
11:46:38 2 suggestion to, perhaps, we address that at the next Status
11:46:47 3 Conference.

11:46:47 4 MR. GUARINO: Your Honor, I think that is an
11:46:51 5 appropriate topic for the future Status Conference with
11:46:55 6 Magistrate Judge Cobb.

11:47:06 7 MAGISTRATE JUDGE COBB: Does that take care of
11:47:07 8 topic five then?

11:47:09 9 MR. GUARINO: I believe so, Your Honor.

11:47:10 10 JUDGE DU: And I don't want to interfere with
11:47:13 11 Judge Cobb's handling of the discovery in this case, but I
11:47:21 12 wonder if there -- and I realize that the United States has
11:47:25 13 explained the timing and the need to reengage the engineers
11:47:29 14 and the contractors, and that you need until the end of the
11:47:34 15 year to begin that process. I'm just hoping that the process
11:47:37 16 would move forward more quickly, so that you don't get to a
11:47:40 17 point where you have to wait for a Status Conference for
11:47:44 18 anything to occur. I assume that there are going to be -- so
11:47:48 19 for example, when I hear that you will submit the traditional
11:47:52 20 case conference and discovery conference report, or schedule,
11:47:55 21 after the next Status Conference, I'm thinking the next
11:48:00 22 Status Conference may not occur for several more months.
11:48:03 23 It seems to me the schedule should be proposed before the
11:48:06 24 Status Conference, but that's up to Judge Cobb. My only
11:48:09 25 preference is for the case to move forward and move forward

11:48:13 1 expeditiously.

11:48:16 2 MR. GUARINO: Your Honor, Guss Guarino with the
11:48:18 3 United States.

11:48:18 4 I hear the Court and I understand that. I would --
11:48:21 5 I believe working with Magistrate Judge Cobb and the other
11:48:25 6 parties to come up with a plan is a good one. The
11:48:30 7 circumstances, the facts and circumstances, the discovery,
11:48:32 8 the material that's going to be used in our litigation
11:48:36 9 position is going to be developed and finalized -- finalized
11:48:40 10 and developed -- in the next year, and so we will have that
11:48:46 11 information ready to go and it will be current and pertinent
11:48:52 12 and to the point on the United States' claims as they relate
11:48:55 13 to the tribal claims. That's what I anticipate. But working
11:48:59 14 with the magistrate judge and the other parties to establish
11:49:03 15 a timeline for events to occur, we will do that.

11:49:07 16 And, I can assure the Court we are not waiting for
11:49:11 17 the Court to tell us what we need to do. We absolutely know
11:49:16 18 what we need to do and we're going to do it. We don't need
11:49:19 19 prompting by the Court to do it. We don't want to start a
11:49:22 20 process prematurely that is not going to be -- is not going
11:49:25 21 to be a good use of anybody's time. And so we absolutely
11:49:29 22 hear the Court about wanting to proceed with, with purpose and
11:49:35 23 determination, and the intent on -- if we're going to take
11:49:39 24 this to a litigative end -- a litigating end, then we are
11:49:46 25 ready to do it.

11:49:46 1 JUDGE DU: And I appreciate that assurance. I
 11:49:50 2 realize this is not a normal case, but the Ninth Circuit
 11:49:54 3 issued the memorandum of disposition -- or was it a published
 11:49:57 4 decision? I can't remember now --

11:49:57 5 MAGISTRATE JUDGE COBB: Published.

11:49:58 6 JUDGE DU: -- that was in May of this year. So,
 11:50:01 7 it's been five months.

11:50:03 8 MR. GUARINO: Yes.

11:50:04 9 MAGISTRATE JUDGE COBB: Well, let's --

11:50:05 10 MR. GUARINO: I understand.

11:50:06 11 MAGISTRATE JUDGE COBB: -- set a deadline then
 11:50:07 12 for a Discovery Plan and Scheduling Order. I know we'll
 11:50:12 13 address it at the next Case Management Conference, but can
 11:50:17 14 you have that circulated among the parties and filed by, say,
 11:50:23 15 30 days, Mr. Guarino?

11:50:25 16 MR. GUARINO: I think a more realistic time is
 11:50:29 17 going to be 60 to 90 days, judge.

11:50:32 18 MAGISTRATE JUDGE COBB: For a discovery plan?

11:50:39 19 MR. GUARINO: Well, Your Honor, I would ask the
 11:50:41 20 Court to consider it this way. As I said, I'm trying to get,
 11:50:44 21 uh, resources to use to engage the litigation in this case.
 11:50:52 22 The -- we're not -- we don't anticipate -- I don't anticipate
 11:50:56 23 that it's appropriate to have us engage in a discovery process
 11:51:00 24 during the course of our work to analyze and articulate a more
 11:51:06 25 detailed statement than claimant by the United States. So, I

11:51:10 1 think it's best that that process be done before we open it
 11:51:15 2 up for others to engage in discovery. They don't even know --
 11:51:20 3 they don't have a copy of our expert reports. Those expert
 11:51:23 4 reports won't be ready for no less than 18 months --

11:51:27 5 JUDGE COBB: Eighteen months?

11:51:29 6 MR. GUARINO: -- once we get the resources
 11:51:31 7 necessary for these experts to do the work. So engaging
 11:51:35 8 in a discovery plan beforehand seems premature to myself.
 11:51:40 9 That's why, so in anticipating what we need to move this
 11:51:44 10 case forward, asking for 60 to 90 days to develop that
 11:51:50 11 plan that won't, won't initiate for months after that, is
 11:51:54 12 reasonable. We would ask the Court to consider it that way.

11:51:57 13 JUDGE DU: Would the other parties like to
 11:51:59 14 comment?

11:52:03 15 MR. JOHNSTON: I would.

11:52:05 16 JUDGE DU: Please do.

11:52:06 17 MR. JOHNSTON: Brad Johnston on behalf of --
 11:52:12 18 there's various entities. I'll call them the Peri entities.

11:52:16 19 What I'm hearing from the United States is they
 11:52:18 20 want, effectively, a one year stay to get their case together
 11:52:21 21 and their experts together during that period, then no one
 11:52:25 22 else engages in any discovery, and then we start the process
 11:52:29 23 once they have everything together. That's what I've heard
 11:52:33 24 them say at least twice now, which is that they need a year to
 11:52:36 25 articulate their claims, work with their experts to marshal

11:52:40 1 those claims, file another, I guess, amended pleading, and
11:52:45 2 then we go from there with the discovery. And I don't know
11:52:48 3 if that's right or wrong, if that's what it's going to take,
11:52:52 4 but that's what I hear the State -- or the United States
11:52:54 5 requesting at this juncture.

11:52:58 6 And maybe they can clarify whether or not that is
11:53:01 7 or was not what they're asking for, but that's what I've just
11:53:04 8 heard, now, for the second time; no discovery until they
11:53:08 9 complete all their work and expert, and then I guess dump
11:53:11 10 that on the other side, and then we proceed from there?

11:53:15 11 JUDGE DU: Mr. Johnston, that's a fair
11:53:16 12 question. I'm going -- why don't you remain at the lectern.
11:53:20 13 I would like for Mr. Guarino to respond to that request for
11:53:23 14 clarification.

11:53:23 15 MR. GUARINO: Um, Your Honor, this case has been
11:53:33 16 pending since 1990, when the United States first articulated
11:53:37 17 a very broad statement to claimant on behalf of the tribes.
11:53:41 18 They include a water right claim, associated with storage
11:53:45 19 capacity and storage operation of water reservoir. They
11:53:49 20 include water rights claims for land that were added to the
11:53:56 21 reservation after 1936. I believe it was September 22nd,
11:54:00 22 1936. As well, we asserted water right claims for the entire
11:54:03 23 reservation for groundwater purposes.

11:54:06 24 When, when building and pursuing a water right claim
11:54:10 25 on behalf of an Indian tribe, whether it's here or anywhere

11:54:15 1 else throughout the west, currency -- as in whether or
11:54:21 2 not the evidence that you've got is current and the most
11:54:28 3 up-to-date information that you got to present to the court --
11:54:32 4 is an important issue. Issues of staleness become very
11:54:39 5 pertinent to these claims, given that there are both
11:54:42 6 hydrologic and economic issues involved. Preparing and
11:54:49 7 finalizing a claim years before a water right claim is
11:54:55 8 litigated, it just makes it so that you wasted a whole lot
11:54:59 9 of effort.

11:55:00 10 This case has been in a very unusual procedural
11:55:07 11 stance for more than two decades, in which the United States
11:55:14 12 was heavily engaged in spending a great deal of resources in
11:55:18 13 activity that the Court specifically ordered the United States
11:55:21 14 to do. During that time, there was no justification for
11:55:24 15 the United States to finalize, in detail, the water rights
11:55:29 16 claims of the United States. The United States was engaged
11:55:33 17 in this process in 2015 and 2014, because we anticipated that
11:55:39 18 we were moving towards a litigative solution. That process
11:55:46 19 was derailed by this Court's decision in 2015. And when
11:55:49 20 that happened, there was no justification -- because we had
11:55:53 21 no claims at that time -- - there was no justification for
11:55:55 22 continuing to build in detail the -- and make current the
11:55:58 23 water rights claims and we've, essentially, had to shelve
11:56:02 24 everything that we had done for three years and, now, we have
11:56:06 25 to pull it off. And yes, we are taking the steps necessary

11:56:10 1 to do that. We are -- we immediately started acting, between
11:56:15 2 the Department of Justice and the Department of Interior, to
11:56:19 3 do that. And of course, the Court understands we engaged in
11:56:23 4 a budgetary process, of which I am not in control of, and
11:56:28 5 nor are any of my agents associated with the Department of
11:56:31 6 the Interior.

11:56:33 7 We are going as fast as we can and I had indicated
11:56:35 8 to the Court what I believed to be a realistic and optimistic
11:56:40 9 view of how things will unfold. So, yes, I am indicating to
11:56:45 10 the Court that I have no resources to continue to build and
11:56:49 11 finalize the water rights claims and take them off the shelf
11:56:53 12 with my expert, until I get those resources. And that will
11:56:56 13 not be until, I'm told, as I am told, at the end of this year,
11:57:00 14 after which I anticipate I need to get my experts the time,
11:57:04 15 once they have the resources, to do the work that they need.
11:57:08 16 Once I have that, I can get to that point. And maybe it will
11:57:11 17 be sooner. Maybe it won't. I am anticipating, based upon my
11:57:17 18 experience doing this work, that it will take approximately
11:57:20 19 one year. And so I'm hoping that by the end of the year,
11:57:22 20 that we will be in a position to do what I think is necessary,
11:57:25 21 which is detail for the other parties the exact extent,
11:57:29 22 factual extent of our claims.

11:57:31 23 I do not anticipate dumping anything on any parties.
11:57:35 24 All parties will have the ability to engage in the discovery
11:57:38 25 process that gives them the ability to review the materials of

11:57:41 1 the United States, and the discovery materials of the United
11:57:43 2 States. They will not be unreasonable -- an unreasonable
11:57:47 3 process. It will be one in which they have the full extent,
11:57:51 4 to their abilities, to engage in the discovery process.

11:57:55 5 So, that's what I've described to the Court and the
11:57:57 6 parties.

11:57:57 7 JUDGE DU: So is the answer to Mr. Johnston's
11:57:59 8 question, yes, that you want the other parties to delay
11:58:03 9 their discovery for one year while they wait for the United
11:58:07 10 States?

11:58:09 11 MR. GUARINO: The Court in the 2000 order, the
11:58:14 12 Case Management Order, stayed all discovery proceedings.
11:58:17 13 There are no discovery proceedings that any party can engage
11:58:20 14 in right now. We haven't, we haven't quaffed into that
11:58:26 15 realm of activities for this litigation in two decades, Your
11:58:29 16 Honor, and so we have not gotten there. And I am telling
11:58:33 17 the Court that I anticipate that it would be best, under my
11:58:36 18 understanding of where the tribal claims are, and what we need
11:58:40 19 to do to get us in a position to have discovery make sense, it
11:58:47 20 will take us until the end of next year.

11:58:49 21 And if the Court, or anybody intended to engage in
11:58:55 22 discovery right now, as I say give us all the reports that
11:58:57 23 you have associated with this component and that component to
11:59:02 24 the claims, this material or that material, the response would
11:59:04 25 be -- the response would not be very much. And, it certainly

11:59:07 1 would not be final and it, certainly, would have to be
11:59:10 2 finalized. So there's no -- there is no open discovery right
11:59:14 3 now. That's been the case for two decades. And to the -- and
11:59:19 4 nobody is entitled to discovery right now. That's a process
11:59:22 5 that we just haven't crossed into. I believe we could cross
11:59:25 6 into that process in a year.

11:59:30 7 JUDGE DU: Thank you.

11:59:31 8 Mr. Johnston.

11:59:32 9 MR. JOHNSTON: Well, I think if I understood
11:59:34 10 correctly, it is what I understood; that the United States
11:59:36 11 would like a year to get amended claims on file, and that's
11:59:39 12 when the case then starts into a discovery phase. I just
11:59:43 13 wanted an answer to that question and I don't think that the
11:59:46 14 United States is answering my question. More importantly,
11:59:49 15 the United States isn't answering Your Honor's question in a
11:59:52 16 very direct manner, to let us know what they are proposing.

11:59:55 17 THE COURT: Oh, I think he answered the
11:59:57 18 question. My question to you is do you have any comments
11:59:59 19 or response to that?

12:00:00 20 MAGISTRATE JUDGE COBB: And what is your
12:00:01 21 proposal?

12:00:03 22 MR. JOHNSTON: Well, I, if -- what I don't want
12:00:06 23 to do, I can tell you, I don't want to have everything change
12:00:10 24 12 months from now, while we engage in discovery on what's
12:00:14 25 on file now. I don't think that's fair to the parties. And,

12:00:19 1 what you would end up having then, I think, is a very, very
12:00:22 2 lengthy discovery schedule, and proposed amendments to the
12:00:26 3 pleadings, what, 12 months from now, only to hear from the
12:00:29 4 United States it's all going to change? And then we're going
12:00:32 5 to rehash things?

12:00:34 6 So I have to think about that in detail, but I
12:00:37 7 don't want to spend time and effort on what exists now, only
12:00:42 8 to find out we're going to see some sort of motion to amend
12:00:46 9 the claims and it's going to be factually different than what
12:00:49 10 we understand the claims to be today.

12:00:51 11 JUDGE DU: So, in a way, it seems that
12:00:53 12 Mr. Guarino's suggestion makes sense; and that is, let the
12:00:57 13 United States obtain its experts' reports so the parties
12:01:01 14 know what to expect and how to tailor its own discovery. That
12:01:07 15 seems more cost efficient for the other parties.

12:01:10 16 MR. JOHNSTON: It may be, but I don't know if
12:01:12 17 I'm -- I did not expect to hear a year from now is where we go
12:01:19 18 forward. It's an issue I would have to think about and I
12:01:23 19 would want to talk to other counsel for the -- I call them the
12:01:28 20 defendants. I guess they're the counter-defendants since it's
12:01:32 21 a counterclaim. But, I just wanted to make sure I was clear
12:01:34 22 on what the United States was proposing at this point in time.

12:01:38 23 JUDGE DU: Thank you, Mr. Johnston.

12:01:39 24 MAGISTRATE JUDGE COBB: Mr. Johnston, before
12:01:40 25 you leave -- and maybe Mr. DePaoli might want to address this

12:01:44 1 as well -- do you envision any nonexpert type discovery that
12:01:48 2 could be undertaken before the expert reports come out?

12:01:53 3 MR. JOHNSTON: I certainly think there's going
12:01:55 4 to be nonexpert discovery in this case.

12:01:59 5 MAGISTRATE JUDGE COBB: Is there any reason why
12:02:00 6 that could not proceed in the immediate future?

12:02:05 7 MR. JOHNSTON: Well, I think that gets into, you
12:02:08 8 know, if your start engaging in discovery now, and then the
12:02:11 9 nature and the factual predicate of the claims changes, are we
12:02:16 10 not using time efficiently?

12:02:17 11 That's the concern I have. And I think -- I
12:02:20 12 understand this case is totally different than other cases
12:02:23 13 where you engage in discovery and you have a deadline to amend
12:02:26 14 the pleadings, or at least to file motions. And this is
12:02:28 15 different given its complexity and the number of parties
12:02:32 16 involved. But, I just don't know what -- what I'm hearing
12:02:40 17 is something being proposed from the United States that is
12:02:43 18 very different than how any case proceeds. So -- but I would
12:02:49 19 let any of the other counsel, Mr. DePaoli, address this issue
12:02:52 20 to the extent they have thoughts.

12:02:59 21 MR. DEPAOLI: Gordon DePaoli on behalf of the
12:03:05 22 Walker River Irrigation District.

12:03:11 23 We have, because of the way this case has been
12:03:14 24 managed, no one has even filed an answer in this case yet.
12:03:20 25 Not only has there not been any discovery, there are no

12:03:24 1 answers. And that was one of the issues that was left open
12:03:27 2 as to, at what point in time would answers be required?
12:03:31 3 And if so, would you need to include, potentially,
12:03:36 4 counterclaims?

12:03:39 5 So I think that we need to think about that
12:03:47 6 question, as well as the discovery, in light of what the
12:03:53 7 United States is indicating. If there is going to be amended
12:03:56 8 pleadings a year from now addressing the issue of answers,
12:04:02 9 we would have to do that again a year from now.

12:04:13 10 I raise the issue as to counterclaims because the
12:04:15 11 United States is, essentially, asserting water rights from the
12:04:21 12 Walker River that are not currently recognized in the decree.
12:04:28 13 There have been other water rights allowed by the State of
12:04:32 14 Nevada State through the State administrative process since
12:04:35 15 the decree. What has happened in California, I do not
12:04:38 16 know. But the issue of whether those rights, now, have to
12:04:41 17 be asserted for purposes of the decree, would need to be
12:04:45 18 addressed as well.

12:04:47 19 I do think that there is discovery that would --
12:04:51 20 could be done in advance of whatever it is that the United
12:04:57 21 States has in mind. I anticipate, and have anticipated,
12:05:01 22 considerable document discovery in relation to the United
12:05:05 23 States tribal claims as they are presently in the pleadings.

12:05:11 24 That's, essentially, where I would begin. And
12:05:15 25 then where it would go from there, I'm not sure. But there

12:05:19 1 is discovery in addition to expert discovery, in my judgment.

12:05:33 2 MAGISTRATE JUDGE COBB: Judge Du, if it meets
12:05:34 3 with your approval, I would suggest that you direct the
12:05:37 4 parties to meet and confer to address what I contemplated
12:05:44 5 in these Discovery Plan and Scheduling Order. And we can
12:05:47 6 hash this out further, but my impression is that, well, there
12:05:51 7 may be experts that are way down the road but, in the interim,
12:05:55 8 there can be discovery that should be undertaken. And I would
12:06:02 9 think that the parties, by meeting and conferring with that
12:06:04 10 directive, can come up with a Scheduling Order and Discovery
12:06:08 11 Plan that, perhaps, addresses deadline for answers, slash,
12:06:13 12 counterclaims -- heaven forbid, third party claims -- and also
12:06:19 13 a proposed discovery plan, which is more than likely going to
12:06:24 14 be modified, but it creates a roadmap for us to get this case
12:06:30 15 fired up again and moving along.

12:06:32 16 JUDGE DU: I agree. And I think that the order
12:06:36 17 should also indicate the deadline for amendment to pleadings
12:06:39 18 as well. That the parties should meet and confer and submit
12:06:43 19 the proposed order within 60 days, before your next Status
12:07:03 20 Conference.

12:07:03 21 MAGISTRATE JUDGE COBB: I had discussed this
12:07:05 22 matter with my courtroom administrator about a proposed date
12:07:10 23 for the next Status Conference, and I really hadn't taken it
12:07:15 24 out in contemplation of beyond 60 days, which takes us to
12:07:19 25 mid December. We can do that. Let me look at my calendar

12:07:26 1 here. I had just gone out to December 14th.

12:07:33 2 Maybe, Judge Du, this it one of the latter agenda
12:07:36 3 items, but if you don't mind us addressing it now -- and it
12:07:39 4 is around the holidays, but perhaps sometime the week of
12:07:46 5 December 17, and I would suggest either the 17th, 19th, 20th
12:07:52 6 or 21st as a date for our next Status Conference. We'll have
12:07:57 7 to work back from there for both the submission of the agenda
12:08:01 8 and the Proposed Discovery Plan and Scheduling Order. But, I
12:08:06 9 just -- I think much later than that, we're going to be pushed
12:08:11 10 out into January, which is not consistent, I believe, with
12:08:16 11 what the directive is from the Judge Du about moving the
12:08:21 12 case.

12:08:23 13 So, that would put a time frame for you to have --
12:08:27 14 if, say, we did it, hypothetically, Wednesday the 19th, or
12:08:30 15 Monday the 17th, or whatever date works out. The Discovery
12:08:36 16 Plan and Scheduling Order and agenda due about 10 to 14 days
12:08:43 17 before that, which takes us to early December.

12:08:47 18 Maybe, Mr. Guarino, can you address that time
12:08:51 19 frame?

12:08:51 20 MR. GUARINO: Your Honor, so I understand it,
12:09:00 21 the Court is contemplating to have the parties propose a
12:09:06 22 Scheduling Order and Discovery Plan for nonexpert information
12:09:17 23 or material associated with the tribal claims -- how many days
12:09:21 24 before the 17th or 19th?

12:09:24 25 MAGISTRATE JUDGE COBB: Let me also add,

12:09:25 1 Mr. Guarino, I would probably set a target date for expert
12:09:29 2 disclosures by the United States, I guess what you're looking
12:09:33 3 at, the end of 2019. And with a -- we will have to address
12:09:40 4 at that conference what is a reasonable time frame, then,
12:09:44 5 to allow the defendants to have their expert reports. This
12:09:48 6 is not your typical case that 30 days is going to work.

12:09:51 7 So if we have conference on the 19th, then we
12:09:56 8 would probably be looking at having the Discovery Plan and
12:10:00 9 Scheduling Order and agenda submitted by December 7?

12:10:10 10 MR. GUARINO: December 7?

12:10:10 11 MAGISTRATE JUDGE COBB: December 7.

12:10:18 12 So, if I may address counsel on your availability
12:10:29 13 for a Status Conference on, let's say, Wednesday the 19th.

12:10:33 14 Mr. Guarino, you may have to -- one of you are going
12:10:36 15 to have to travel again.

12:10:39 16 Mr. Negri, you're from Boise, right?

12:10:41 17 MR. NEGRI: That's correct, Your Honor.

12:10:42 18 The 19th works for me. The 17th doesn't. So, the
12:10:45 19 19th would be great on my end.

12:10:48 20 MAGISTRATE JUDGE COBB: Okay.

12:10:50 21 After what the Broncos did to the Wolf Pack,
12:10:54 22 Saturday, I probably shouldn't give you any leeway.

12:10:56 23 MR. NEGRI: My apologies, but they've had a
12:11:00 24 tough year any way, so.

12:11:01 25 MAGISTRATE JUDGE COBB: The 19th? Any objection

12:11:03 1 to a Status Conference at ten o'clock on the 19th?

12:11:07 2 (No response.)

12:11:09 3 MAGISTRATE JUDGE COBB: Well, let's set a Status
12:11:14 4 Conference for Wednesday, 19th, December, at 10:00 a.m. It
12:11:17 5 will be in Courtroom Two, with your leave, Judge Du.

12:11:22 6 And let's set a deadline, then, of the 7th for the
12:11:29 7 submission of the agenda and the Proposed Discovery Plan and
12:11:33 8 Scheduling Order, which we may have to address further at the
12:11:38 9 Status Conference on the 19th.

12:11:44 10 JUDGE DU: And to be clear, Judge Cobb, the
12:11:46 11 Status Conference is with you only. I don't see a need for a
12:11:52 12 joint status.

12:11:53 13 MAGISTRATE JUDGE COBB: If that's permission
12:11:56 14 with you, yes.

12:11:56 15 JUDGE DU: Yes. I think the 19th I'm either in
12:11:57 16 trial in Reno or Las Vegas anyway.

12:11:57 17 MR. JOHNSTON: It's here, Your Honor, because
12:11:59 18 I'll be here. I figure I could leave it to Mr. DePaoli and
12:12:03 19 others to attend in my absence.

12:12:12 20 MAGISTRATE JUDGE COBB: Shall we return to the
12:12:15 21 agenda? The hour is late. Is there anything else on the
12:12:19 22 agenda? I think we're looking at page 3, topics six through
12:12:23 23 ten.

12:12:23 24 I think we addressed ten. I think we addressed
12:12:32 25 nine. I think we pretty much addressed seven already, the

12:12:36 1 postcard notice issue.

12:12:38 2 Judge Du, if I may ask if anyone else has anything
12:12:43 3 to bring up to the Court.

12:12:45 4 Mr. Guarino? Any of the other --

12:12:49 5 MR. GUARINO: Sorry. Guss Guarino for the
12:12:51 6 United States. I was on mute there.

12:12:53 7 I believe between items six, seven, eight, nine,
12:12:57 8 ten, I don't have anything further to add. I believe we've
12:13:00 9 addressed the subjects of six, seven, eight, and nine.

12:13:07 10 MAGISTRATE JUDGE COBB: All right. Judge Du, I
12:13:10 11 think that addresses the agenda.

12:13:13 12 Thank you, Mr. Guarino, for your office in taking
12:13:15 13 the lead in preparing the agenda. That is, I think, helpful
12:13:20 14 for the parties to have a roadmap. And we look forward to
12:13:24 15 having that for the next Status Conference.

12:13:26 16 JUDGE DU: Before we conclude, are there any
12:13:30 17 other issues that the parties would like for the Court to
12:13:33 18 address before we conclude this Status Conference?

12:13:37 19 (No response.)

12:13:42 20 JUDGE DU: Well, thank you. And I, again,
12:13:44 21 appreciate that counsel took the time to educate me, in
12:13:48 22 particular, on the relationship between all these cases and
12:13:52 23 the status of the case. Obviously, as you can see, I didn't
12:13:55 24 read every order issued in this case. I read the Status
12:14:00 25 Reports, which were helpful. And I'm sure that going forward,

12:14:06 1 you will point out any orders I need to know whenever there is
12:14:09 2 a dispute about how to proceed in this case.

12:14:11 3 All right. Thank you.

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5 (Court Adjourned.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

\s\ Kathryn M. French

December 3, 2018

KATHRYN M. FRENCH, RPR, CCR
Official Reporter

DATE

12:14:16
12:14:16